# TRANSCRIPT OF RECORD

## SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1926

No. [redacted] 119

AUGUST DORCHY, PLAINTIFF IN ERROR,

vs.

THE STATE OF KANSAS

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS

FILED MAY 20, 1926

(31,212)

(31.212)

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

## No. 491

AUGUST DORCHY, PLAINTIFF IN ERROR,

*vs.*

THE STATE OF KANSAS

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 23, 1925

[fol. 1] [Caption omitted]

[fol. 2] **IN SUPREME COURT OF KANSAS**

MANDATE FROM SUPREME COURT OF THE UNITED STATES—Filed Apr. 21, 1924

UNITED STATES OF AMERICA, ss:

[SEAL.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Kansas, Greeting:

Whereas, lately in the Supreme Court of the State of Kansas, before you, or some of you, in a cause between August Dorchy, appellant, and The State of Kansas, appellee, wherein the judgment of the said Supreme Court, entered in said cause on the 4th day of November, A. D. 1922, is in the following words, viz:

"This cause comes on for decision and thereupon it is ordered and adjudged that the judgment of the court below be affirmed. It is further ordered that the appellant pay the costs of this case in this court taxed at $— and hereof let execution issue."

as by the inspection of the transcript of the record of the said Supreme Court which was brought into the Supreme Court of the United States by virtue of a writ of error agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and twenty-three, the said cause came on to be heard before the Supreme Court of the United States on the said transcript of record, and was argued by counsel:

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be, and the same is hereby reversed without costs.

[fols. 3 & 4] And it is further ordered that this cause be, and the same is hereby, remanded to the said Supreme Court for further proceedings not inconsistent with the opinion of this Court.

March 10, 1924.

And the same is hereby remanded to you, the said Judges of the said Supreme Court of the State of Kansas, in order that such further proceedings may be had in the said cause, in conformity with the judgment and decree of this Court above stated, as according to right and justice, and the Constitution and laws of the United States, ought to be had therein, the said writ of error notwithstanding.

Witness the Honorable William H. Taft, Chief Justice of the United States, the 19th day of April, in the year of our Lord one thousand nine hundred and twenty-four.

Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

(Endorsed:) 24174. File No. 29,279. Supreme Court of the United States. No. 163, October Term, 1923. August Dorchy v. The State of Kansas. Mandate.

[File endorsement omitted.]

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[fol. 5] IN SUPREME COURT OF KANSAS

No. 24,174

AUGUST DORCHY, Appellant,

v.

THE STATE OF KANSAS, Appellee

MOTION OF APPELLEE TO SPREAD UPON THE RECORD THE MANDATE OF THE SUPREME COURT OF THE UNITED STATES AND TO AFFIRM JUDGMENT—Filed April 29, 1924

Now comes the State of Kansas, the above named appellee, and states to the court that the mandate of the Supreme Court of the United States, in the action which was pending in that court wherein August Dorchy, the above named appellant, was plaintiff in error, and the State of Kansas, the above named appellee, was defendant in error, involving the validity of the judgment entered by this court in this cause, which mandate was issued April 19, 1924, has been received by the clerk of this court and was by him filed April 21, 1924 and should be spread upon the records of this court in this cause.

In the opinion of the Supreme Court of the United States in said cause rendered March 10, 1924, the said court in substance held that the judgment heretofore rendered in this cause in this court should be vacated and the case sent back to this court, in order that it may pass upon the question whether the decision by the Supreme Court of the United States in the case of the Charles Wolff Packing Company, plaintiff in error, vs. The Court of Industrial Relations, defendant in error, entered by that court June 11, 1923, had the effect to render invalid Sec. 19 and the other sections under which this case was prosecuted, and August Dorchy was convicted, of Chap. 29, Laws of Kansas, special session, 1920; "An act creating the Court of Industrial Relations" etc.

[fols. 6 & 7] The appellee moves the court to spread upon its record the said mandate of the Supreme Court of the United States.

The appellee further moves the court to pass upon the question, remitted to it as aforesaid by the opinion and decision of the Supreme Court of the United States, and also to hold that Sec. 19 of Chap. 29, Laws of Kansas, special session, 1920, and the other sections of said act under which this cause was prosecuted and said August Dorchy was convicted, were at times of the commission of the acts charged in the information and during the pendency of this action, valid and constitutional, and that said sections have not been in effect or by consequence rendered or held void or unconstitutional by the said decision of the Supreme Court of the United States in the case of The Charles Wolff Packing Company vs. The Court of Industrial Relations of the State of Kansas.

And the appellee moves the court in all ways to enforce the judgment heretofore rendered in this cause by this court.

(Signed) Charles B. Griffith, Attorney General; John G. Egan, Assistant Attorney General, Attorneys for Appellee. Chester I. Long, Austin M. Cowan, William E. Stanley, of Counsel.

[File endorsement omitted.]

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[fol. 8] IN SUPREME COURT OF KANSAS

[Title omitted]

ORDER GRANTING MOTION TO SPREAD MANDATE UPON RECORD—June 3, 1924

This cause comes on for hearing upon the motion of the appellee for an order spreading the Mandate of the United States Supreme Court upon the records of this court, and for further proceedings in conformity therewith; and thereupon after oral argument by John G. Egan, for the appellee and by Redmond S. Brennan for the appellant, it is ordered that the mandate from the United States Supreme Court showing a reversal of the judgment of this court be spread upon the records of this court, in words and figures as follows, to-wit:

MANDATE FROM UNITED STATES SUPREME COURT—Omitted; printed side page 2 ante

[fols. 9 & 10] It is further ordered that this cause be taken under advisement for reconsideration. It is further ordered that the appellant be given two weeks from this date in which to file brief herein, and that the appellee be given a few days thereafter within which to file a reply brief herein.

[fols. 11 & 12] IN SUPREME COURT OF KANSAS

[Title omitted]

JUDGMENT—July 5, 1924

This cause comes on for decision and thereupon it is ordered and adjudged that the judgment of the district court imposing upon August Dorchy the penalties prescribed by Section 19 of the Rules of the Court of Industrial Relations Act, is reaffirmed. It is further ordered that the appellant pay the costs of this case in this court taxed at $— and hereof let execution issue.

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[fol. 13] IN SUPREME COURT OF KANSAS

[Title omitted]

OPINION—Filed July 5, 1924

Syllabus by the Court—Burch, J.

By virtue of interpretative section 28 of the act creating the court of industrial relations (R. S. 44-628), section 19 (R. S. 44-619) is so far severable from the scheme of the legislation that it may stand alone, dissociated from the provisions relating to fixing wages, and is to be regarded as having the legal effect of an independent statute, making it a punishable offense for an officer of a labor union, acting in his official capacity, to call a strike of coal miners, whereby operation of a coal mine, in the production of coal, is suspended.

Appeal from Cherokee District Court, Frank W. Boss, Judge.
Opinion Filed July 5, 1924. Reaffirmed

Phil. H. Callery, James E. Callery, both of Pittsburg, and Redmond S. Brennan, of Kansas City, Mo., for the appellant.

Charles B. Griffith, Attorney-general, John G. Egan, assistant attorney-general, and Chester I. Long, Austin M. Cowan, and William E. Stanley, all of Wichita, for the appellee.

Johnston, C. J., Mason, J., Marshall, J., Dawson, J., and Hopkins, J. concurring.

Burch, J., and Harvey, J. dissenting.

A true copy. Attest:
D. A. Valentine, Clerk Supreme Court. (Seal of the Supreme Court, State of Kansas.)

[fol. 14] The opinion of the court was delivered by BURCH, J.:

Defendant was convicted of violating section 19 of the act creating the court of industrial relations (Laws 1920, ch. 29, R. S. 44-619.) The section reads as follows:

"Any officer of any corporation engaged in any of the industries, employments, utilities or common carriers herein named and specified, or any officer of any labor union or association of persons engaged as workers in any such industry, employment, utility or common carrier, or any employer of labor, coming within the provisions of this act, who shall willfully use the power, authority or influence incident to his official position, or to his position as an employer of others, and by such means shall intentionally influence, impel, or compel any other person to violate any of the provisions of this act, or any valid order of said court of industrial relations, shall be deemed guilty of a felony and upon conviction thereof in any court of competent jurisdiction shall be punished by a fine not to exceed $5,000, or by imprisonment in the state penitentiary at hard labor for a term not to exceed two years, or by both such fine and imprisonment."

The industry described in the information was coal mining. The labor union was district No. 14, United Mine Workers of America. Alexander Howat was president, and August Dorchy was vice president of the union. The charge was that Howat and Dorchy used their official positions to induce miners in the coal mine known as Mine H, operated by the George K. Mackie Fuel Company, to cease work, for the purpose and with the effect of suspending continuous operation of the mine for production of coal for use in Kansas. Reduced to plain terms, Howat and Dorchy, as officers of the union, called a strike of union miners of the fuel company's mine, an unlawful act within contemplation of section 19.

The verdict of the jury in Dorchy's case reads as follows:

"We, the jury, duly empanelled and sworn to try the issues joined in the above-entitled cause, do on our oaths find the defendant, August Dorchy, guilty of a misdemeanor, in that said defendant did willfully hinder, delay, limit and suspend the operation of coal mine H of the George K. Mackie Fuel Company, in violation of chapter 29 of the Laws of Kansas of the Special Session 1920; com-[fol. 15] mitted all in manner and form as charged in the information in this case."

Judgment was entered on the verdict that defendant should pay a fine of $500, serve six months' imprisonment in the county jail, and pay costs of the prosecution. Defendant appealed to this court, and the judgment was affirmed. (The State v. Dorchy, 112 Kan. 235, 210 Pac. 352.) The case was taken by writ of error to the Supreme Court of the United States, which reversed the judgment of this court, in order that this court may determine whether section 19 of the act is so far severable from the general scheme of the legislation that it may stand alone, dissociated from the provisions held unconstitutional in Wolff Co. v. Industrial Court, 262 U. S. 522. (Dorchy v. Kansas, adv. op. No. 163, March 10, 1924.)

Section 28 of the act reads as follows:

"If any section or provision of this act shall be found invalid by any court, it shall be conclusively presumed that this act would have been passed by the legislature without such invalid section or provision, and the act as a whole shall not be declared invalid by reason of the fact that one or more sections or provisions may be found to be invalid by any court." (R. S. 44-628.)

In the case of The State, ex rel., v. Howat, 109 Kan. 376, 198 Pac. 686, the court said:

"Understanding the pioneer character of its work, the legislature framed the statute so that any invalid provision—not section [only], but provision (section 28)—may be eliminated without affecting others. This rule of interpretation extends to application of the same provision to different subjects." (P. 416.)

This rule was applied expressly in the case of The State, ex rel., v. Howat, 107 Kan. 423, 191 Pac. 585, and was tacitly applied in the case of Court of Industrial Relations v. Packing Co., 114 Kan. 487, — Pac. —. A writ of error to reverse the judgment in Howat's case was dismissed by the Supreme Court of the United States, in Howat v. Kansas, 258 U. S. 181.

In the case of The State, ex rel., v. Howat, 109 Kan. 376, 198 Pac. 686, the court said:

"In dealing with the subject of the constitutionality of the legislation of 1920, the court can render no service by veiling the harshness of reality. The court of industrial relations is justified by facts, or is not justified at all, and it will be necessary to present a few disagreeable facts which lie naked to astonished gaze in our industrial history." (P. 395.)

[fol. 16] Then followed exemplification of an appalling strike record in this state and elsewhere in the United States, including an account of the calling of the strike for which Dorchy was convicted in the case under consideration. When that strike was called, Howat and Dorchy were not employees of the George K. Mackie Fuel Company, the boy Mishmash, for whose benefit the strike was called, had not been employed by the fuel company for a year and a half, and no employee of the fuel company had any grievance whatever against his employer. The strike was called because Howat did not recognize courts. The exemplification referred to concluded as follows:

"Under these circumstances, on January 5, 1920, the legislature met in special session at the call of Governor Allen, to consider what it might do to protect the people of the state of Kansas from dislocations in production and distribution of the necessaries of life. The result of its deliberations was the act creating the court of industrial relations." (p. 402.)

In the proclamation calling the special session the governor said:

"An extraordinary occasion has arisen in the history of our state. A nation-wide strike of coal miners in the bituminous coal fields began on November 1, 1919, and has constantly continued. We were at the mercy of a fuel famine. The emergency in Kansas was so poignant that it became necessary for the state to take over the mines and call for volunteer workers to produce coal for the needs of the people.

* * * * * * *

It would be the most ironical episode in the history of the world if the freest government on earth should allow itself to be trapped into a condition where all of its functions waited upon the quarrel between the owners of some essential industry and its employees, while the people froze, starved, or went naked because the natural avenues of production were stopped by a ruthless quarrel, in the making of which the people had no part." (Senate Journal, Special Session 1920, pp. 1, 2.)

In his message to the special session of the legislature, the governor said:

"An extraordinary need for additional legislation was revealed during the last two months, by a most daring attempt to override government and make the public the helpless victim of a fuel famine. With a heartlessness that has no paralled in the history of the industrial quarrel, the public was told that, while the controversy over a wage scale was going on between capital and labor, it could freeze. * * *

"Both parties to the quarrel had supplied themselves with sufficient coal to keep themselves from freezing, and the attitude to the [fol. 17] public was of that callous indifference which has become familiar to the public. * * *

"There is no reason why government should not have the same power to protect society against the ruthless offenses of industrial strife as it has always had to protect it against recognized crime. * * *" (Senate Journal, Special Session 1920, pp. 5, 6, 7.)

The court of industrial relations act undertook to provide a method of settling industrial disputes in essential industries, by a scheme which the supreme court of the United States miscalls compulsory arbitration. Justice was to be done between employer and employee but protection of the public interest was to be paramount, and the public interest is not a subject of arbitration. Besides that, the constitution and functions of the tribunal forbade its classifications as an arbitral body.

It is doubtful if the legislature seriously believed its declaration that the clothing industry was affected with a public interest would stand, or that, under any foreseeable circumstances, that industry could become affected with a public interest. The legislature did

know that strikes in the coal mines closed public institutions, stopped public and private business, caused suffering in homes, and threatened death to patients in hospitals. In addition to providing a method of settling disputes affecting production of coal, striking and picketing were dealt with in sections 17 and 18. The right of any individual worker, however, to leave his employment at any time and for any reason, was expressly recognized. In the case of The State, ex rel., v. Howat, 109 Kan. 376, 198 Pac. 686, the court said:

"The statute expressly guards the privilege of any employee to quit his employment at any time. He may quit before controversy arises, when controversy arises, while controversy is raging, and after controversy has been adjusted. As many others as desire may do like wise, and they may do so as the result of mutual-interest consultations." (p. 416.)

In his message to the legislature, the governor said:

"While these tragedies were impending, the state, through a receivership ordered by the Supreme Court, took charge of the mines, and spent a week urging the miners to return to work for the state, to relieve the public from the menace of the famine. A proposal similar to the one they accepted several weeks later at [fol. 18] Indianapolis was made to them by the state of Kansas. Many miners expressed the desire to accept it, but the leaders refused to allow them to return to work. A large number of miners expressed to me their desire to work, their lack of sympathy with the effort to freeze the public; but said that if they should go back to work their property would be in peril, their families humilated, and their very lives endangered." (Senate Journal, Special Session 1920, p. 6.)

To free labor-union members from tyrannical domination by ruthless labor leaders, prevent meddlesome interference with the relation between employer and employee, and so secure continuity in production of coal, section 19 was inserted in the law.

The statute responded in part to a growing public sentiment for consolidation of multiplied administrative boards and commissions, and the legislative intention was that the court should become, as it did become, the repository of the functions of the public utilities commission, the department of labor and industry, the industrial welfare commission, the free employment bureau, and other state agencies. While the public utilities commission has been divorced from the court of industrial relations, the court still has a large jurisdiction aside from that relating specifically to composing industrial disputes.

The opinion in the case of Wolff Co. v. Industrial Court, 262 U. S. 522, concludes as follows:

"We think the industrial court act, in so far as it permits the fixing of wages in plaintiff in error's packing house, is in conflict

with the Fourteenty Amendment and deprives it of its property and liberty of contract, without due process of law." (p. 544.)

The precise question here involved is whether it was intended that the provision against using official power to call strikes in the enumerated industries should stand, even if the provisions relating to regulation of wages be held unconstitutional. The legislature selected language which, if read literally, declared that to be its purpose, when it said that, if any section or provision should be found invalid, it should be conclusively presumed the rest of the act would have been passed without it. To avoid this effect, it is neces- [fol. 19] sary to read an exception into the act by interpretation, because of the intimate relation between forbidding strikes and furnishing another remedy for the wrongs against which they might be directed. The very fact that such relation must have been present to the mind of the legislature suggests that, if the exception had been intended, it would have been expressed. The conclusion is that, because of the provisions of section 28, section 19 is to be regarded as having the legal effect of an independent statute, making it a punishable offense for an officer of a labor union, acting in his official capacity, to call a strike of coal miners.

The judgment of the District Court imposing upon Dorchy the penalties prescribed by section 19 of the court of industrial relations act, is reaffirmed.

Johnston, C. J., Mason, J., Marshall, J., Dawson, J. concurring. Hopkins, J. not sitting.

Burch, J. (dissenting):

The foregoing are the views of the majority of my associates.

It may be explained here that in this court cases are assigned after submission, but before consultation, by arbitrary rule. At consultation, the decision and the grounds of the decision are determined. The opinion of the court is then prepared by the justice to whom the case was assigned, in accordance with the directions given him at consultation. This method has been followed to the court's satisfaction for many years.

The coal strike of 1919-1920 prompted the statute, but the burden of the statute was the new kind of remedy for the adjustment of industrial disputes. In his message to the legislature the governor outlined the character of legislation which he believed should be adopted, basing it upon the proposition that operation of the great industries affecting food, clothing, fuel, and transportation, should be declared to be impressed with public interest, because so impressed, subject to reasonable regulation. He then said that *by means of such* legislation the state would be able to make strikes, lockouts, boycotts and black lists *unnecessary* (italics mine). To my mind, the act discloses on it face that such was precisely the scheme of the legislation, and section 28 is to be given a reasonable rather than a [fol. 20] literal application. If some labor leaders were sinners, some coal-mine operators were not saints, and deprivation of the

remedy for grievance by strike of workmen ordered and directed by union officers, is merely an incident and consequence of the erection of an administrative tribunal sitting to dispense industrial justice.

I have never supposed that a man who opened a strip-pit mine producing a few tons of coal a day, was engaging in a business affected with a public interest in such manner as to subject conduct of that business to regulation on that ground. In my opinion, no public interest, in the legal sense, was involved when the court of industrial relations interfered in the business of the Wolff Packing Company. I had supposed, however, that under stress of circumstances involving, or threatening immediately to involve, an entire industry like production of coal, and threatening the perils to which the people of this state were exposed by the coal strike of 1919-20, law might accord with fact. During that winter the public was tremendously interested in continuity of production of coal—witness the action of ten thousand persons who volunteered to enter the coal mines of Kansas and take the places of striking miners. It seemed to me it would not be training the categories of the law to say, correlatively, that in such an emergency the production of coal becomes impressed with a public interest, and subject to regulation by enforcible orders until warring operators and miners come tion by enforcible orders until warring operators and miners come to agreement and resume production of coal, or the public is otherwise made secure against calamity. The state ought to have the same privilege to protect its people against the consequences of a coal strike that congress has to protect the people of the United States against the consequences of a transportation strike. When this court, without my concurrence, rendered it decision in the Wolff case, my gun-behind-the-door theory of the law went into the legal junk heap; and in view of the opinion of the Supreme Court of the United States in the Wolff case, it seems to me the majority of this court is not sustaining the act, notwithstanding an invalid provision, as section 28 contemplates, but is sustaining a provision, although the act itself has become important to accomplish its purpose.

HARVEY, J. (dissenting):

When the special session of the legislature met in 1920 and passed the act creating the Court of Industrial Relations (some of the mem- [fol. 21] bers objected to the word "court" being used to designate a commission without judicial functions, but it was insisted the word would give it a standing and influence which would enable it better to function, which insistence prevailed), its members and those not members who were instrumental in the preparation and passage of the act were mostly concerned with finding a way to prevent a repetition of the economic loss, the serious inconveniences, personal hardships amounting in some cases to actual suffering, which the public had sustained because of the general strike of November 1, 1919, in the bituminous coal fields. They were only indirectly concerned with the immediate problems between the operators and

the miners. They wanted any measure passed to be just both to the employers and to the employees, whether considered singly or in groups. Hence the purpose was to frame a measure which would prevent injury to the public from a controversy between employers and employees and which would be fair when applied to them. It was thought that the public injury could be avoided by the reasonably continuous and efficient operation of essential industries. The production of fuel, food and clothing and the transportation of freight and passengers were regarded as essential industries,—a general shutting down of any of these would cause serious loss and injury to the public; by their reasonably continuous and efficient operation the public would not suffer. But, how was that to be accomplished by legislation? Predicated upon the doctrine of Munn v. Illinois, 94 U. S. 113, and allied cases, if the essential industries named were declared by the legislature to be impressed with a public interest, and this declaration was approved by the courts, then legislation looking to the enforcement, as against both employers and employees, of this reasonably continuous and efficient operation of the essential industries could be made effective. This reasonable continuity and efficiency of the operation of the essential industries was then to be obtained by conducting hearings of controversies between employers and employees and making necessary and reasonable orders, which could be enforced by proceedings in the courts. As these orders were to be made in fairness both to the employer and to the employees there could arise no just reason for a shutdown or lockout on the one hand or a strike on the other, and each was made unlawful and penalties provided. We must view the matter now in the light of the decision of the United States Supreme Court in the Wolff Packing Co. case, 262 [fols. 22 & 23 ] U. S. 522, where it was held that the essential industries named in the act,—the production of fuel, food and clothing,—are not impressed with a public interest, and that so far as the act attempts to authorize the Industrial Court to make and enforce orders upon employers in those industries concerning their relations with their employees—and especially as to wages—it is void. We must also view the matter in the light of the decision of that court in this case, 44 Sup. Ct. Rep. 323, and say whether that part of the act making it an offense to call a strike and imposing penalties therefor stands as a valid provision of the act. It is my judgment the purpose to provide for the reasonably continuous and efficient operation of essential industries, without injustice either to the employer or the employee, based upon the doctrine that the essential industries named are impressed with the public interest and authorizing the commission to conduct hearings and make orders which can be enforced in the courts and making the refusal to comply with such orders, either by the employer or the employee, an offense, should for the purpose of construing section 28 of the act be regarded as one provision. If the doctrine upon which the act is based and the parts of the act as to employers are invalid, it should necessarily follow that the parts of the act as to employees should be held in-

valid. This act did not seek to destroy labor organizations, but they were specifically recognized, encouraged but not required to incorporate, and their right to bargain collectively for their members was recognized. The calling of a strike, not previously an offense in this state, was made an offense, with punishments, only because a court or commission was created which could hear their grievances and make reasonable orders which could be enforced.

A true copy. Attest:
D. A. Valentine, Clerk Supreme Court. Seal of Supreme Court, State of Kansas.

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[fols. 24 & 25] IN SUPREME COURT OF KANSAS

[Title omitted]

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING—Filed Aug. 6, 1924

Comes now August Dorchy, Appellant in the above entitled cause, in person, and by his attorney of record, Redmond S. Brennan, and respectfully prays the court for leave to file out of time his Petition for Rehearing, annexed hereto.

Appellant respectfully states to the court that he was unavoidably delayed, because of consultations that had to be held in different and distant cities, in the preparation of the Petition for Rehearing and was therefore unable to have the Petition for Rehearing filed within the prescribed period.

Wherefore, Appellant prays that he be permitted to file his Petition for Rehearing in the above entitled cause on this 6th day of August, 1924.

Redmond S. Brennan, Attorney for Appellant.

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[fols. 26 & 27] IN SUPREME COURT OF KANSAS

[Title omitted]

ORDER GRANTING MOTION FOR LEAVE TO FILE PETITION FOR REHEARING—Aug. 7, 1924

On application of appellant and for good cause shown it is ordered that the appellant be permitted to file a motion for a rehearing herein out of time.

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[fols. 28-33] Petition for rehearing, covering 5 pages, filed Aug. 7, 1924, omitted from this print.

[fols. 34 & 35] IN SUPREME COURT OF KANSAS

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—Oct. 18, 1924

Now comes on for hearing the motion for a rehearing of this cause, and thereupon it is ordered that said motion for a rehearing be overruled.

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[fol. 36] IN SUPREME COURT OF KANSAS

[Title omitted]

ORDER RECALLING MANDATE—Nov. 21, 1924

The court having under consideration an application of the Appellant August Dorchy, for an order recalling the mandate of this court herein, and being fully advised in the premises it is ordered, that said Application be allowed, and that the Mandate of this court herein, be and the same is recalled from the District Court of Cherokee County, Kansas, pending an application for a Writ of Error to the U. S. Supreme Court.

Clerk's certificate to foregoing papers omitted in printing.

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[fols. 37 & 38] IN SUPREME COURT OF KANSAS

[Title omitted]

CLERK'S CERTIFICATE

I, D. A. Valentine, Clerk of the Supreme Court of the State of Kansas do hereby certify that the above and foregoing is a true, full and complete transcript of the record and proceedings had in the above entitled case, and also of the opinion of the court rendered thereon as the same appear on file and remain of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in the city of Topeka, this 13th day of March, A. D. 1925.

D. A. Valentine, Clerk Supreme Court of Kansas. (Seal of the Supreme Court, State of Kansas.)

[fol. 39] IN SUPREME COURT OF KANSAS

[Title omitted]

PETITION FOR WRIT OF ERROR—Filed Feb. 17, 1925

Comes now August Dorchy and reports that on the — day of October, 1924, a final judgment was entered by the Supreme Court of the State of Kansas reaffirming the judgment and sentence entered by the District Court of Cherokee County, Kansas, in a proceeding wherein the State of Kansas was Plaintiff and August Dorchy, Defendant, which judgment and sentence was in favor of the plaintiff and against the defendant.

That this action was a criminal proceeding instituted against the defendant upon a charge that he violated certain provisions of Chapter 29 of the Kansas Special Session Laws, 1920, known as the Kansas Court of Industrial Relations Act, in that as an officer of a Labor Organization of Mine Workers, he participated in the calling or ordering of a strike in Mine H of the Mackie Fuel Company in Cherokee County, Kansas.

That Plaintiff in Error herein is, and at all the times referred to in said cause was an officer of the United Mine Workers of America, District No. 14, an association commonly known as a Labor Union. In his answer in said cause in the District Court of Cherokee County, of the State of Kansas, the Plaintiff in Error averred that the proceeding was in violation of his constitutional rights as guaranteed by the Constitution of the United States, and averred that the Act creating the Court of Industrial Relations, which is the Act above [fol. 40] referred to, and the proceeding being resorted to in this cause violated constitutional rights and privileges guaranteed to Plaintiff in Error in and by the Fourteenth Amendment to the Constitution of the United States, as well as the Fifth Amendment to the Constitution of the United States, as well as the Thirteenth Amendment to the Constitution of the United States, and also deprived this Plaintiff in Error of his liberty and property without due process of law, and abridged his privileges and immunities as a citizen of the United States, and sought to compel involuntary servitude, and compel and enforce a system of compulsory arbitration, and to punish Plaintiff in Error for the calling of a strike, all contrary to the Constitution of the United States of America.

Your Petitioner further avers that said Kansas Court of Industrial Relations Act is unconstitutional and void for the reason that said legislative enactment violates Section Twenty-one of Article Four of the Constitution of the United States.

Your Petitioner further avers that said Act is violative of Section One of Article Thirteen of the Constitution of the United States and that said contention is expressly made by this Defendant in his defense to said accusation. That in said suit, your Petitioner claimed the rights, privileges and immunities hereinabove set forth. That notwithstanding these facts, the Supreme Court of the State of

Kansas, decided against the rights, privileges and immunities thus specified, set forth and claimed by this Petitioner.

Your Petitioner further avers that in this same cause, this Honorable Court considered some of the errors hereinabove alleged by Plaintiff in Error and ordered and adjudged that a previous decision of the Supreme Court of the State of Kansas, in this cause, in which the judgment of the District Court of Cherokee County, Kansas, was sought to be affirmed and enforced against your Petitioner, was by this Court reversed. But your Petitioner further avers that notwithstanding the error and violation of the rights of Plaintiff in [fol. 41] Error under the Constitution of the United States, and notwithstanding the mandate of this Court, said Honorable Supreme Court of the State of Kansas did reaffirm the said judgment of the District Court of Cherokee County, Kansas, and did misconstrue and seek to misapply to your Petitioner his rights under the Constitution of the United States as in the opinion of this Honorable Court in this cause previously decided; that said decision of this Honorable Court, in this cause, was delivered March 10, 1924, (68 Lawyers' Edition 369).

Your Petitioner shows that the judgment and decision and interpretation of the Constitution of the United States and of the Federal Statutes enacted under the provisions of said Constitution, and of the decision of this Honorable Court upon the previous appeal and hearing of this cause, and the denial to him of his right of freedom of speech, personal liberty and freedom of contract, and immunity from involuntary servitude, and from compulsory arbitration, and from punishment for calling a strike, and other rights hereinabove stated, as herein claimed, were and are repugnant to and contravene the Constitution and Statutes of the United States of America.

Your Petitioner further shows that the Supreme Court of the State of Kansas is the highest court in said state to which this cause may or might be taken, and your Petitioner further avers that in the aforesaid judgment and proceeding certain errors were committed to the prejudice of your petitioner, all of which will more fully appear from the Assignment of Errors which is filed herein.

Wherefore your Petitioner prays that his Writ of Error from the Supreme Court of the United States may issue in this cause to the Supreme Court of the State of Kansas, for the correction of errors so complained of, and that a transcript of the record and proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of the State of Kansas, may be sent to the Supreme Court of the United States as provided by law.

Redmond S. Brennan, Phil. A. Callery, Frank B. Hegarty,
Attys. for Petitioner.

[fol. 42] IN SUPREME COURT OF KANSAS

[Title omitted]

ORDER ALLOWING WRIT OF ERROR—Filed Feb. 17, 1925

In consideration of the petition of August Dorchy, Plaintiff in Error, for a Writ of Error, and Assignment of Errors, and upon due consideration of the record of said cause:

It is ordered that a Writ of Error be allowed from the Supreme Court of the United States as prayed for in said petition and that said Writ of Error and Citation thereon be issued, served and returned to the Supreme Court of the United States in accordance with law upon condition that the said Petitioner and Plaintiff in Error, August Dorchy, give security in the sum of Two Thousand ($2,000.00) Dollars; that said Plaintiff in Error shall prosecute said Writ of Error to effect, and if said Plaintiff in Error fail to make good his plea, he shall answer to the Defendant in Error for all costs and damages that may be adjudged or decreed on account of said Writ of Error.

And the said Plaintiff in Error, having previously presented and filed his bond in the sum of Two Thousand ($2,000.00) Dollars, with W. J. Watson and H. B. Kumm as sureties, It Is Ordered that the same be and is hereby duly approved and said bond continued and held in force and effect pending the final disposition of this cause.

In witness whereof, I have hereunto set my hand this 17th day of February, 1925.

W. A. Johnston, Chief Justice of the Supreme Court of the State of Kansas.

[fol. 43] [File endorsement omitted.]

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[fol. 44] IN SUPREME COURT OF KANSAS

[Title omitted]

ASSIGNMENTS OF ERROR—Filed Feb. 17, 1925

Now comes August Dorchy, Petitioner and Plaintiff in Error, by Redmond S. Brennan and Phil H. Callery, his attorneys, and in connection with his petition for a Writ of Error, shows that in the record and proceedings and the rendering of the judgment and decision of the Supreme Court of the State of Kansas in the above entitled cause, manifest error has intervened to the prejudice of this Petitioner and Plaintiff in Error in this, to-wit:

I

That the Supreme Court of the State of Kansas erred in reaffirming the decree, judgment and sentence of the District Court of Cherokee County, Kansas, and directing that the judgment and sentence of said District Court be carried into force and effect, because said decision of the Supreme Court of the State of Kansas, as aforesaid, deprived this Plaintiff in Error of his rights of personal liberty and freedom of contract, as guaranteed by the Fourteenth Amendment to the Constitution of the United States, in that by said decision of the Honorable Supreme Court of the State of Kansas it was held that numerous invalid sections of said Industrial Court Act did not destroy or render invalid the whole Act, which decision is in conflict with the previous decisions of the State of Kansas and of the Supreme Court of the United States.

[fol. 45] Therefore, the Supreme Court of the State of Kansas erred in holding that the decision of the District Court of Cherokee County, Kansas did not violate the Fourteenth Amendment to the Constitution of the United States.

II

The Supreme Court of the State of Kansas, in its decision in the above entitled cause, erred in holding that said Statute of the State of Kansas, known as the Court of Industrial Relations Act, was not wholly invalid, as in violation of the Constitution of the United States, but that only certain sections or provisions of said Act were unconstitutional and that said sections were severable from the rest of the Statute and that other sections, sought to be applied to Plaintiff in Error, were not violative of the Constitution of the United States and were severable under the same Act from said unconstitutional sections or provisions.

III

The decision of the Supreme Court of the State of Kansas is erroneous in that said decision violates the rights of your Petitioner under the Constitution of the United States in that it seeks to compel involuntary servitude and compulsory arbitration upon the part of Petitioner and to punish your Petitioner for the calling of a strike, whereas, by the Constitution of the United States and by the previous decision of the Supreme Court of the United States in this cause, (68 Lawyers' Edition 369, Advance Opinions, October Term, 1923), it was held that said decision of the Supreme Court of Kansas and said provisions of the Kansas Court of Industrial Relations Act, as sought to be applied to your Petitioner in this cause, violated the rights of your Petitioner and contravened the Constitution of the United States in respect of said involuntary servitude, compulsory arbitration and calling of a strike.

[fol. 46]

IV

The decision of the Supreme Court of the State of Kansas, in reaffirming the judgment of the District Court of Cherokee County, Kansas, is erroneous in that decision is at variance with the decisions of the United States Supreme Court in the case of Wolff Packing Company vs. Industrial Court, 262 U. S. 522, and Dorchy vs. Kansas, 68 Law. Ed. 369, and other decisions of the Supreme Court of the United States, as to the right of the legislature of the State of Kansas to interfere with personal liberty, regulation of wages, and freedom of contract, the right to strike, the right to peacefully picket, and immunity from involuntary servitude, under the Constitution of the United States, which questions are of such general importance throughout the land as to merit review and determination by the Supreme Court of the State of Kansas.

V

The decision of the Supreme Court of the State of Kansas is erroneous for the reason that it violates Section One of Article Thirteen of the Constitution of the United States, known as the Thirteenth Amendment.

VI

The decision of the Supreme Court of the State of Kansas is erroneous for the reason that said decision is in conflict with and violates Section One of Article Fifteen of the Amendments to the Constitution of the United States, known as the Fifteenth Amendment, and thereby violates the rights guaranteed to your Petitioner by said Constitution.

VII

The Kansas Supreme Court erred in this cause in ordering that the judgment of the District Court of Cherokee County, Kansas, be enforced against Plaintiff in Error for the reason that said judgment [fol. 47] was reversed by the Supreme Court of the United States in its decision in a prior appeal of this cause, which decision was handed down by the Supreme Court of the United States on March 10, 1924, and which directs that the previous decision of the Supreme Court of the State of Kansas, in which it was ordered that said judgment of the District Court of Cherokee County, Kansas, be enforced against Plaintiff in Error should be reversed and because, by virtue of said decision of the United States Supreme Court, Plaintiff in Error should be permitted to go hence with his costs and that the refusal so to do violates the rights of Plaintiff in Error under the Constitution of the United States.

VIII

The Supreme Court of the State of Kansas erred in not upholding the contention of your Petitioner to the effect that the provisions of the Kansas Court of Industrial Relations Act which seek to compel involuntary servitude, and compulsory arbitration, and to punish

for calling a strike, and to abridge freedom of speech, and personal liberty, and freedom of contract, are not in violation of the rights of Petitioner as claimed before said District Court of Cherokee County, Kansas, and said Supreme Court of the State of Kansas by your Petitioner and that said provisions could be applied to your Petitioner in this cause.

IX

The Supreme Court of the State of Kansas erred in not upholding the contention of Plaintiff in Error to the effect that the Kansas Court of Industrial Relations Act, as a whole, and also that the sections sought to be applied to Plaintiff in Error in this cause, constitute Class Legislation, unjust and illegal discrimination, and arbitrary and unreasonable classification in violation of the "due process" clause of the Fourteenth Amendment to the United States Constitution.

[fol. 48]

X

The decision of the Supreme Court of Kansas is in error in deciding that the legislature of the State of Kansas may make it a crime to strike, picket, or, as an officer of a Labor Organization, to compel, or impel, or direct others to strike, or to peacefully picket, and that the conviction and sentence of this Petitioner in this cause was not a violation of his right of freedom of speech as guaranteed to him under the Constitution of the United States.

XI

The decision of the Supreme Court of the State of Kansas is erroneous in holding that your Petitioner can be punished under the criminal provisions of said Court of Industrial Relations Act for the calling of a strike and that said criminal sections, as sought to be applied to the Plaintiff in Error in this cause, are not in violation of the Constitution of the United States and are severable from the sections previously held unconstitutional as in contravention of the Constitution of the United States by the Supreme Court of the United States and in holding that the legislature of the State of Kansas had the capacity to enact said Kansas Court of Industrial Relations Act in the form in which it would stand after severing the sections heretofore held to be unconstitutional, and in holding that said sections heretofore held to be unconstitutional by the Supreme Court of the United States in its decision in Wolff Packing Company vs. Industrial Court, 262 U. S. 522, and in Dorchy vs. Kansas, 68 Law. Ed. 369, were severable and that the remaining sections, clauses and provisions of said Act were not so interwoven and commingled with the unconstitutional sections as to cause the whole of said Act to be in violation of the Constitution of the United States.

Redmond S. Brennan, Phil H. Callery, Frank B. Hegarty.

[fol. 49] [File endorsement omitted.]

[fols. 50 & 51] Bond on Writ of Error for $2,000.00—Approved and filed March 3, 1925; omitted in printing

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[fol. 52] In Supreme Court of Kansas

[Title omitted]

Writ of Error—Filed Feb. 17, 1925

The United States of America:

To The President of the United States of America and to the Honorable Judges of the Supreme Court of the State of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of the plea which is in said Supreme Court of the State of Kansas before you, being the highest court of law or equity of the said State in which a decision could be had in the suit between August Dorchy, Appellant, vs. the State of Kansas, Appellee, wherein was drawn in question the validity of a treaty or a statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of or an authority exercised under said statute, upon the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege or exemption specially set up, or claimed under such clause of the said Constitution, treaty, statute or commission; and a manifest error hath happened to the great damage of said August Dorchy, Appellant, as by said complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy [fol. 53] justice done to the parties as aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, to send the record and proceedings as aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this Writ so that you may have the same in said Supreme Court at Washington, within thirty (30) days from the time hereof, that the record and proceedings as aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States, the 17th day of February in the Year of our Lord One Thousand Nine Hundred and Twenty Four.

F. L. Campbell, Clerk United States District Court for the District of Kansas, by Nelle Clough, Dep. Clerk. (Seal of District Court U. S., District of Kansas.)

Allowed this 17th day of February, 1925. W. A. Johnston, Chief Justice of the Supreme Court of the State of Kansas.

[fol. 54] [File endorsement omitted.]

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[fols. 55 & 56] CITATION—In usual for showing service on C. B. Griffith; filed Feb. 17, 1925; omitted in printing

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[fol. 57] IN SUPREME COURT OF KANSAS

CERTIFICATE OF LODGMENT

I, D. A. Valentine, Clerk of the Supreme Court of the State of Kansas do hereby certify that there was lodged with me as such clerk on February 17th, 1925, in the above entitled cause,—

1. The Original Bond for Appeal of which a copy is herein set forth, and

2. Two copies of the Writ of Error as herein set forth, one for the Appellee and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court of the State of Kansas, in the City of Topeka, the 13th day of March, A. D. 1925.

D. A. Valentine, Clerk of the Supreme Court of the State of Kansas. (Seal of the Supreme Court, State of Kansas.)

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[fol. 58] IN SUPREME COURT OF KANSAS

RETURN TO WRIT OF ERROR

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified Transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said Supreme Court of the State of Kansas in the City of Topeka, this 13th day of March, A. D. 1925.

D. A. Valentine, Clerk of the Supreme Court of the State of Kansas. (Seal of the Supreme Court, State of Kansas.)

Endorsed on cover: File No. 31,212. Kansas Supreme Court. Term No. 491. August Dorchy, plaintiff in error, vs. The State of Kansas. Filed May 20th, 1925. File No. 31,212.

(B)

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WM. R. STANSB
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No. 119.
(Was No. 491, October Term, 1925.)

# In the Supreme Court of the United States

**October Term, 1926.**

---

AUGUST DORCHY, *Plaintiff in Error,*

vs.

THE STATE OF KANSAS, *Defendant in Error.*

---

*In Error to the Supreme Court of the State of Kansas.*

---

## BRIEF OF PLAINTIFF IN ERROR.

---

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*Attorney for Plaintiff in Error.*

JOHN F. McCARRON,
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# In the Supreme Court of the United States

**October Term, 1926.**

---

AUGUST DORCHY, *Plaintiff in Error,*

vs.

THE STATE OF KANSAS, *Defendant in Error.*

---

*In Error to the Supreme Court of the State of Kansas.*

---

## BRIEF OF PLAINTIFF IN ERROR.

---

No. 119.
(Was No. 491, October Term, 1925.)

---

## STATEMENT.

The cause herein comes to this court on writ of error to the Supreme Court of the State of Kansas.

This cause was heretofore before the court in *Dorchy* v. *Kansas*, in 264 U. S. 286, and involved the question as to whether Dorchy was guilty of a violation of the Court of Industrial Relations Act of Kansas, approved

January 23, 1920, for calling a strike in a coal mine in Kansas.

This court reversed the judgment of the Supreme Court of Kansas, but the latter court construed this court's opinion and mandate to mean that it could compel Dorchy to answer to the original conviction and sentence.

The constitutionality of the statute in question was attacked by Dorchy and the assertion by him that his Federal constitutional rights were violated by the attempted application of the Court of Industrial Relations Act to him, as these questions had been seasonably raised by him in the lower court.

This court reversed the decision of the Kansas Supreme Court, and in passing upon the questions involved, speaking through Mr. Justice Brandeis, said in part:

> "The Court of Industrial Relations Act was approved January 23, 1920. Laws of Kansas, 1920, Special Session, c. 20. The purpose of the statute is to insure continuity of operation in coal mining and other businesses declared to be affected with a public interest. The means provided for accomplishing this is a system of compulsory arbitration of industrial disputes. The instrument is the so-called industrial court. Upon it is conferred power to investigate all matters involved in such controversies; to make findings thereon; to issue such orders as it may deem needful, fixing the wages to be paid, the hours of work, the rules for work, and the working and living conditions. The provisions in aid of the enforcement of this system are both comprehensive and detailed. The employer is prohibited, among other things, from limiting or ceasing operations with a view to defeating the purpose of the statute. Likewise, every association of persons (e. g., trade unions) is prohibited from acting to that end. In effect, strikes and lockouts, the boycott and picketing, are made unlawful. Any person violating any provision of the statute, or any order of the so-called court, is declared guilty of a

misdemeanor. Some of the provisions of the act were considered in *Howat* v. *Kansas*, 258 U. S. 181, 42 Sup. Ct. 277, 66 L. Ed. 550, and in *Charles Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522, 43 Sup. Ct. 630, 67 L. Ed. 1103.

Section 19 provides that any officer of a union of workmen engaged in an industry within the provisions of the act, who shall wilfully use the power incident to his official position to influence any other person to violate any provision of the statute or any valid order of the Court of Indutrial Relations, shall be deemed guilty of a felony punishable by a fine not to exceed $5,000, or by imprisonment at hard labor, not to exceed two years, or by both such fine and imprisonment. Under this section an information was filed against Dorchy, a union official, for calling a strike in a coal mine. He was found guilty. The judgment entered was affirmed by the highest court of the state, 112 Kan. 234, 210 Pac. 252; and a rehearing was denied. The case is here on writ of error under Section 237 of the Judicial Code as amended (Comp. St. Ann. Supp. 1923, Sec. 1214). It is contended that Section 19 is void because it prohibits strikes; and that to do so is a denial of the liberty guaranteed by the Fourteenth Amendment.

After the judgment under review was entered in the Supreme Court of Kansas, this court declared, in Wolff Packing Co. case, *supra*, p. 544, that the system of compulsory arbitration as applied to packing plants violates the Federal Constitution. For the reasons there set forth, it is unconstitutional, also, as applied to the coal mines of that state. The question suggests itself whether Section 19 has not, therefore, necessarily fallen as a part of the system of compulsory arbitration. If so, there is no occasion to consider the specific objection to the provisions of that section. This court has power not only to correct errors in the judgment entered below, but, in the exercise of its appellate jurisdiction, to make such disposition of the case as justice may now require. *Gulf, Colorado & Santa Fe Ry. Co.* v. *Dennis*, 224 U. S. 503, 506, 32 Sup. Ct. 542, 56 L. Ed. 860. In

determining what justice requires the court must consider changes in law and in fact which have supervened since the judgment was entered below. *Watts, Watts & Co.* v. *Unione Austriaca di Navigazione*, 248 U. S. 9, 21, 39 Sup. Ct. 1, 63 L. Ed. 100, 3 A. L. R. 323. If Section 19 falls as the result of the decision in the Wolff Packing Co. case, the effect is the same as if the section had been repealed without any reservation.

* * * * * * *

The Supreme Court of Kansas has already dealt, to some extent, with the effect of our decision upon other sections of the act. When a motion was made there in the Wolff Packing Co. case to spread the mandate of this court upon its record, the state court held that the order of the Court of Industrial Relations under review remains in force in so far as it regulates hours of labor and weekly rest periods. 114 Kan. 304, 219 Pac. 259. The judgment then entered was modified November 10, 1923, upon a rehearing. The relation of Section 19 to the provisions held invalid is a different matter. So far as appears, the state court has not passed upon the question whether Section 19, being an intimate part of the system of compulsory arbitration held to be invalid, falls with it. In order that the state court may pass upon this question, its judgment in this case, which was rendered before our decision in the Wolff Packing Co. case, should be vacated. Compare *Gulf, Colorado & Santa Fe Ry.* v. *Dennis, supra*, p. 509 (32 Sup. Ct. 542). To this end the judgment is

Reversed."

(*Dorchy* v. *Kansas*, 264 U. S. 286.)

The mandate of this court was spread upon the record of the Supreme Court of Kansas under date of June 3, 1924 (Transcript of Record 3), and order of the Supreme Court of Kansas was entered on the same day that the cause be taken under advisement for reconsideration (Transcript of Record 3).

Under date of July 5, 1924, the Supreme Court of Kansas **reaffirmed** the judgment of the District Court, two of the six judges sitting filed dissenting opinions (Transcript of Record 4-12).

The District Court, in its instructions to the jury, stated that the defendants were charged with a violation of Sections 3, 17, 18 and 19 of the Court of Industrial Relations Act. The jury found the defendant guilty of a misdemeanor in violation of Chapter 29 of the laws of Kansas of the Special Session 1920, committed in the manner and form charged in the information. Dorchy was sentenced (under Sec. 19) to six months' confinement in the county jail of Cherokee County, Kansas, and to pay a fine of $500.00 and costs.

Motion for leave to file petition for rehearing was filed August 6, 1924, and the Supreme Court of Kansas granted the order August 7, 1924 (Transcript of Record 12).

Order denying petition for rehearing was made by the Supreme Court of Kansas October 18, 1924, and order recalling mandate of Supreme Court of Kansas from the District Court of Cherokee County was entered by Supreme Court of Kansas on November 21, 1924 (Transcript of Record 13).

Petition for writ of error on behalf of August Dorchy was filed and assignments of error again stressing Federal constitutional rights of plaintiff in error were made and the Chief Justice of the Kansas Supreme Court signed an order allowing a writ of error to this Honorable Court (Transcript of Record 16-21).

(The State of Kansas has completely repealed its Court of Industrial Relations Law since this cause was begun.)

## SPECIFICATION OF ERRORS.

The plaintiff in error claims that the Supreme Court of the State of Kansas erred in reaffirming the judgment of the District Court of Cherokee County, Kansas, in refusing to declare that Chapter 29, Kansas Special Session Laws, 1920, is void for the following reasons:

First. That the judgment of the District Court of Cherokee County, Kansas, ordering and adjudging that the plaintiff in error be confined in the county jail of Cherokee County, Kansas, for a period of six months and pay a fine unto the said State of Kansas in the sum of $500 and costs is void as said judgment is a denial of due process as guaranteed to plaintiff in error by the Fourteenth Amendment to the Constitution of the United States.

Second. The District Court of Cherokee County, Kansas, was without authority to adjudge plaintiff in error guilty of a violation of Section 3 of the Court of Industrial Relations Act for the reason that the mining of coal is not clothed with a public interest and therefore that Section 3 of the said Act is void and of no effect.

Third. That as the mining of coal is not affected with a public interest there was no violation of Section 17 of the Court of Industrial Relations Act by the order of Executive Board of District No. 14 signed by plaintiff in error and sent to certain members of said District No. 14 notifying them to cease work until such time as the Mackie Fuel Company pay Carl Mishmash, one of its members, the money due him in accordance with settlement made by the Joint Board of Miners and Operators.

Fourth. Because the District Court of Cherokee County, Kansas, was without jurisdiction to make its judgment against plaintiff in error committing him to jail

and imposing fine and costs upon him under Section 18 of the Court of Industrial Relations Act, as the plaintiff in error was not guilty of a misdemeanor or any other crime.

Fifth. Because the legislature of the State of Kansas may not make it a crime for an officer of a labor organization to call a strike in a coal mine, as the business of coal mining is not clothed with a public interest and such an act therefore violates the due process clause of the Fourteenth Amendment.

Sixth. The case of *Dorchy* v. *Kansas*, 264 U. S. 286, held that compulsory arbitration is unconstitutional as applied to the coal mines in Kansas. Therefore, plaintiff in error claims that the Supreme Court of Kansas erred in reaffirming its judgment that the calling of a strike by plaintiff in error in a coal mine in Kansas was a violation of Section 19 of Chapter 29 of the Court of Industrial Relations Act Special Session 1920.

## ARGUMENT.

### POINT I.

**Compulsory arbitration is unconstitutional and does not apply to the coal mines in Kansas.**

At the outset, we respectfully direct the Court to that part of its clear, able and direct opinion in *Dorchy* v. *Kansas*, 264 U. S. 286, wherein it said:

> "This court declared in the *Chas. Wolff Packing Co. Case, supra*, p. 544, that the system of compulsory arbitration as applied to packing plants violates the Federal Constitution. For the reasons there set forth it is unconstitutional also as applied to the coal mines of that state."

It will thus be seen that the whole system of compulsory arbitration provided for in the Court of Industrial Relations Act has fallen.

Continuing, this Court said:

> "The question suggests itself whether Section 19 has not, therefore, necessarily fallen as a part of the system of compulsory arbitration. If so, there is no occasion to consider the specific objection to the provisions of that section. This court has power not only to correct errors in the judgment entered below, but, in the exercise of its appellate jurisdiction, to make such disposition of the case as justice may now require. *Gulf, Colorado & Santa Fe Ry. Co.* v. *Dennis*, 224 U. S. 503, 506, 32 Sup. Ct. 542, 56 L. Ed. 860. In determining what justice requires the court must consider changes in law and in fact which have supervened since the judgment was entered below. *Watts, Watts & Co.* v. *Unione Austriaca di Navigazione*, 248 U. S. 9, 21, 39 Sup. Ct. 1, 63 L. Ed. 100, 3 A. L. R. 323. If Section 19 falls as

the result of the decision in the Wolff Packing Co. Case, the effect is the same as if the section had been repealed without any reservation."

* * * * * * * *

The Supreme Court of Kansas has already dealt, to some extent, with the effect of our decision upon other sections of the act. When a motion was made there in the Wolff Packing Co. Case to spread the mandate of this court upon its record, the state court held that the order of the Court of Industrial Relations under review remains in force in so far as it regulates hours of labor and weekly rest periods. 114 Kan. 304, 219 Pac. 259. The judgment then entered was modified November 10, 1923, upon a rehearing. The relation of Section 19 to the provisions held invalid is a different matter. So far as appears, the state court has not passed upon the question whether Section 19, being an intimate part of the system of compulsory arbitration held to be invalid, falls with it. In order that the state court may pass upon this question, its judgment in this case, which was rendered before our decision in the Wolff Packing Co. Case, should be vacated. Compare *Gulf, Colorado & Santa Fe Ry.* v. *Dennis, supra*, p. 509 (32 Sup. Ct. 542).

To this end the judgment is reversed." (*Dorchy* v. *Kansas, supra*, 289, 291.)

The Supreme Court of Kansas, under date of July 5, 1924, said in reaffirming its decision in this case:

"The conclusion is that, because of the provisions of Section 28, Section 19 is to be regarded as having the legal effect of an independent statute, making it a punishable offense for an officer of a labor union, acting in his official capacity, to call a strike of coal miners." (Transcript of Record 9.)

## POINT II.

**Section 19 of the Court of Industrial Relations Act is unconstitutional.**

This court has said:

> "It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator, or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation. It is true that in the days of the early common law an omnipotent Parliament did regulate prices and wages as it chose, and occasionally a colonial Legislature sought to exercise the same power; but nowadays one does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings of which those above mentioned are instances."

*Wolff Packing Co.* v. *Court of Industrial Relations of State of Kans.*, 263 U. S. 536, 538.

Further, this court said:

> "The employer is bound by this act to pay the wages fixed; and while the worker is not required to work at the wages fixed, he is forbidden on penalty of fine or imprisonment to strike against them, and thus is compelled to give up that means of putting himself on an equality with his employer which action in concert with his fellows gives him.
>
> There is no authority of this court to sustain such exercise of power. * * *."

(*Wolff Packing Co., supra,* 540.)

Coupled with the above that compulsory arbitration does not apply to the coal mines in Kansas and is unconstitutional, as set forth in *Dorchy* v. *Kansas*, 264 U. S. 286, we are met with this statement by the Supreme Court of Kansas in the instant case:

> "To free labor union members from tyrannical domination by ruthless labor leaders, prevent meddlesome interference with the relation between employer and employee, and so secure continuity in production of coal, Section 19 was inserted in the law." (Transcript of Record, p. 8.)

This court said in *Charles Wolff Packing Company* v. *Kansas*, in 267 U. S. 563, 654:

> "The declared and adjudged purpose of the Act is to ensure continuity of operation and production in certain businesses which it calls 'essential industries.' To that end it provides for the compulsory settlement by a state agency of all labor controversies in such businesses which endanger the intended continuity. It proceeds on the assumption that the public has a paramount interest in the subject which justifies the compulsion. The businesses named include, among others, that of manufacturing or preparing food products for sale and human consumption. The controversies to be settled include, among others, those arising between employer and employees over either wages or hours of labor. The state agency charged with the duty of making the settlement is the Court of Industrial Relations. Although called a court it is an administrative board. It is to summon the disputants before it, to give them a hearing, to settle the matter in controversy—as by fixing wages or hours of labor where they are what is in dispute—to embody its findings and determination in an order, and, if need be, to institute mandamus proceedings in the Supreme Court of the State to compel compliance with its order. The order is to continue in effect for such reasonable

time as the agency may fix, or until changed by agreement of the parties with its approval. The employer may discontinue the business (a) where it can be conducted conformably to the order only at a loss, or (b) where for good cause shown the agency approves; and individual employees may quit the service in the exercise of a personal privilege, but may not induce others to quit or combine with them to do so. With these qualifications both employer and employees are required to continue the business on the terms fixed in the order, violations and evasions being penalized. The authority given to the agency to fix wages or hours of labor is not general, nor is it to be exerted independently of the system of compulsory settlement. On the contrary, it is but a feature of that system and correspondingly limited in purpose and field of application. No distinction is made between wages and hours of labor; both are put on the same plane. In the fixing of wages regard is to be had for what is fair between employer and employees, and in the fixing of hours of labor regard is to be had for what are healthful periods; but neither is to be fixed save in the compulsory adjustment of an endangering controversy to the end that the business shall go on."

The Supreme Court of Kansas, in its decision in the instant case, states:

> "The precise question here involved is whether it was intended that the provision against using official power *to call strikes in the enumerated industries should stand*, even if the provisions relating to regulation of wages be held unconstitutional." (Italics ours.) (Transcript of Record, p. 9.)

The enumerated industries are set forth in Section 3 of the Act and Paragraph 3 of said section is:

> "(3) The mining or production of any substance or material in common use as fuel, either for domestic, manufacturing, or transportation purposes."

This court, in *Dorchy* v. *Kansas,* 264 U. S. 286, we repeat, held that compulsory arbitration is unconstitutional as applied to the coal mines in Kansas.

As this court has said that compulsory arbitration is unconstitutional as applied to the coal mines in Kansas, the calling of a strike in the enumerated industries in the Act can be no violation of Section 19 of the Act, for as Mr. Justice Van Devanter said in *Wolff Packing Company* v. *Kansas,* 267 U. S. 568:

> "The penalties of the act are directed against effort of either side to interfere with the settlement by arbitration. Without this joint compulsion, the whole theory and purpose of the act would fail. The state cannot be heard to say, therefore, that upon complaint of the employer, the effect upon the employee should not be a factor in our judgment."

The plaintiff in error insists that the penalty sought to be imposed upon him by the State of Kansas is a part of the system of compulsory arbitration and as a part of said system of compulsory arbitration, it shares the invalidity of the whole.

Continuing, Mr. Justice Van Devanter said:

> "The authority which the Act gives respecting the fixing of hours of labor is merely a feature of the system of compulsory arbitration and has no separate purpose. It was exerted by the state agency as a part of that system and the state court sustained its exertion as such. As a part of the system it shares the invalidity of the whole."
> (*Wolff Packing Co., supra,* 569.)

## Conclusion.

The plaintiff in error respectfully submits that his conviction and sentence to jail under the Court of Industrial Relations Act as it stood at that time is illegal and void and that such conviction and sentence is in violation of his constitutional rights under the Fourteenth Amendment to the Constitution of the United States.

It is respectfully submitted that the judgment of the court below be reversed.

Very respectfully,

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No. 31,213

# In the Supreme Court of the United States.

OCTOBER TERM, 1926.

No. 119.

AUGUST DORCHY, *Plaintiff in Error,*
*vs.*
THE STATE OF KANSAS.

*In Error to the Supreme Court of the State of Kansas.*

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# In the Supreme Court of the United States.

**OCTOBER TERM, 1926.**

No. 119.

AUGUST DORCHY, *Plaintiff in Error,*
*vs.*
THE STATE OF KANSAS.

No. 31,212.

*In Error to the Supreme Court of the State of Kansas.*

## Brief for the State of Kansas.

## STATEMENT.

This cause comes to this Court on writ of error to the Supreme Court of the state of Kansas; it was numbered 24,174 in that Court. There had been a decision there November 4, 1922; the opinion on which was reported in *State of Kansas, Appellee, v. Alexander Howat et al. (August Dorchy, Appellant)*, 112 Kan. 235. There was a writ of error issued by this Court and, in case No. 163, October term, 1923, decided here March 10, 1924, a judgment was rendered and opinion filed by this Court.

*August Dorchy v. State of Kansas*, 264 U. S. 286, 291, 68 L. Ed. 686, 690.

The Court referred to its opinion in the case of *Charles Wolff Packing Company v. Court of Industrial Relations*, 262 U. S. 522,

67 L. Ed. 1103, 27 A. L. R. 1280, 43 Sup. Ct. Rep. 630. At the close of its opinion in the Dorchy case, the Court said:

> "So far as appears, the state court has not passed upon the question whether section 19, being an intimate part of the system of compulsory arbitration held to be invalid, falls with it. In order that the state court may pass upon this question, its judgment in this case, which was rendered before our decision in the Chas. Wolff Packing Co. case, should be vacated. Compare *Gulf, C. & S. F. R. Co. v. Dennis*, supra, p. 509. To this end the judgment is reversed."

The judgment of the Supreme Court of Kansas was reversed and the cause remanded to that Court for further proceedings not inconsistent with the opinion of this Court. (Rec. 1.)

Pursuant to the decision of this Court, the question of severability was considered and passed upon by the Supreme Court of Kansas in the case of *The State of Kansas, Appellee, v. Alexander Howat et al. (August Dorchy, Appellant)*, 116 Kan. 412; opinion filed July 5, 1924. This opinion appears in the record, pages 4 to 9. There were also dissenting opinions by Judge Burch (Rec. 9), and by Judge Harvey (Rec. 10). The Court held, quoting from the syllabus of that case:

> "By virtue of interpretative section 28 of the act creating the Court of Industrial Relations (R. S. 44-628), section 19 (R. S. 44-619) is so far severable from the scheme of the legislation that it may stand alone, dissociated from the provisions relating to fixing wages, and is to be regarded as having the legal effect of an independent statute making it a punishable offense for an officer of a labor union, acting in his official capacity, to call a strike of coal miners, whereby operation of a coal mine, in the production of coal, is suspended."

Judgment was entered in the Supreme Court of Kansas accordingly, affirming the judgment of the District Court.

Dorchy filed a petition for rehearing, which was overruled. (Rec. 12, 13.) Thereupon, upon the application of August Dorchy, writ

of error was issued from this Court to the Supreme Court of Kansas with reference to the last named judgment of that court. (Rec. 14-16, 20, 21.)

This case is now here upon the last writ of error.

The transcript of the record in this case does not set out the judgment in the District Court of Cherokee county, Kansas, from which an appeal had been taken by Dorchy to the Supreme Court of Kansas, the information in that case, nor the evidence. The transcript of the record in case 29,279, that is, 163 at the October term, 1923, does contain these matters. We, therefore, in this statement of facts, will refer to the prior transcript of record and the references should be considered as made to that transcript unless otherwise noted.

The prosecution was instituted in the District Court of Cherokee county, Kansas, against Alexander Howat and August Dorchy.

The opinion of the Supreme Court of Kansas in *State of Kansas, Appellee, v. Alexander Howat et al. (August Dorchy, Appellant)*, 112 Kan. 235, when this case was first before it, refers to its opinion in *The State, ex rel., v. Howat*, 109 Kan. 376, and *The State, ex rel., v. Howat*, 109 Kan. 779.

In January, 1920, the legislature of the state of Kansas passed an act, which has not been repealed, entitled, "An act creating the Court of Industrial Relations, defining its powers and duties, and relating thereto, abolishing the Public Utilities Commission, repealing all acts and parts of acts in conflict therewith, and providing penalties for the violation of this act." It was approved by the governor January 23, 1920, and took effect by publication in the official state paper January 24, 1920.

Chapter 29, Laws of Kansas, Special Session, 1920.

We quote sections 17, 18, 19 and 28 of the statute:

"SEC. 17. It shall be unlawful for any person, firm or corporation, or for any association of persons, to do or perform any act forbidden, or to fail or refuse to perform any act or duty enjoined by the provisions of this act, or to conspire or confederate with others to do or perform any act forbidden, or to fail or refuse to perform any act or duty enjoined by the provisions of this act, or to induce or intimidate any person, firm or corporation engaged in any of said industries, employments, utilities or common carriers to do any act forbidden, or to fail or refuse to perform any act or duty enjoined by the provisions of this act, for the purpose or with the intent to hinder, delay, limit, or suspend the operation of any of the industries, employments, utilities or common carriers herein specified or indicated, or to delay, limit, or suspend the production or transportation of the products of such industries or employments, or the service of such utilities or common carriers: *Provided*, That nothing in this act shall be construed as restricting the right of any individual employee engaged in the operation of any such industry, employment, public utility, or common carrier to quit his employment at any time, but it shall be unlawful for any such individual employee or other person to conspire with other persons to quit their employment or to induce other persons to quit their employment for the purpose of hindering, delaying, interfering with, or suspending the operation of any of the industries, employments, public utilities, or common carriers governed by the provisions of this act, or for any person to engage in what is known as 'picketing,' or to intimidate by threats, abuse, or in any other manner, any person or persons with intent to induce such person or persons to quit such employment, or for the purpose of deterring or preventing any other person or persons from accepting employment or from remaining in the employ of any of the industries, employments, public utilities, or common carriers governed by the provisions of this act.

"SEC. 18. Any person willfully violating the provisions of this act, or any valid order of said Court of Industrial Relations, shall be deemed guilty of a misdemeanor, and upon conviction thereof in any court of competent jurisdiction of this state shall be punished by a fine of not to exceed $1,000, or by imprisonment in the county jail for a period of not to exceed one year, or by both such fine and imprisonment.

"SEC. 19. Any officer of any corporation engaged in any of the industries, employments, utilities or common carriers herein named and specified, or any officer of any labor union or association of persons engaged as workers in any such industry, employment, utility or common carrier, or any employer of labor, coming within the provisions of this act, who shall willfully use the power, authority or influence incident to his official position, or to his position as an employer of others, and by such means shall intentionally influence, impel, or compel any other person to violate any of the provisions of this act, or any valid order of said Court of Industrial Relations, shall be deemed guilty of a felony, and upon conviction thereof in any court of competent jurisdiction shall be punished by a fine not to exceed $5,000, or by imprisonment in the State Penitentiary at hard labor for a term not to exceed two years, or by both such fine and imprisonment.

. . . . . .

"SEC. 28. If any section or provision of this act shall be found invalid by any court, it shall be conclusively presumed that this act would have been passed by the legislature without such invalid section or provision, and the act as a whole shall not be declared invalid by reason of the fact that one or more sections or provisions may be found to be invalid by any court."

Later in this statement we sketch the history of the conditions in the coal-mining industry in Cherokee and Crawford counties, Kansas, which led to the enactment of this statute.

The complaint in the case was filed February 17, 1921 (Rec. 8), and was followed in due time by the filing of the information.

The complaints and informations were filed against Alexander Howat and August Dorchy.

There were two counts in the information. (Rec. 13, 15.)

The first count in the information charged, in substance, that on or about February 3, 1921, the coal mine known as Mine H, operated by the George K. Mackie Fuel Company, situated in Cherokee county, Kansas, was in operation for the purpose of the mining and production of coal for and in common use as fuel for domestic, manufacturing and transportation purposes in the state of Kansas.

That on or about that date there existed in that county a labor union, or association of persons, engaged as workers in the employment of maintaining and operating coal mines in that county, including that mine, for the purpose of and in the mining and production of coal for and in common use as fuel for domestic, manufacturing and transportation purposes in Kansas. Said labor union was known as District No. 14, United Mine Workers of America. The defendant, Alexander Howat, was then an officer and president of that labor union, and the defendant, August Dorchy, was then an officer and vice president of that labor union. That at that time certain persons, known as Owen Pryor, William Coleman, Ab Brown, Horace Dixon, William Richardson and George Young, and many others whose names were unknown to the attorney-general and county attorney, were members of said labor union in that county and were then engaged as mine workers and employed by said George K. Mackie Fuel Company at said Mine H in said county and state in the maintenance and operation of that coal mine for the purposes aforesaid.

That on or about February 3, 1921, the defendants, Alexander Howat and August Dorchy, each willfully, intentionally, unlawfully and feloniously used their power, authority and influence incident to his official position with said labor union—that is, Alexander Howat as an officer and president, and August Dorchy as an officer and vice president—to each willfully, intentionally, unlawfully and feloniously influence and impel said Owen Pryor and said other persons named and not named, who were then engaged as workers and employed in the maintenance and operation of that mine for the purposes aforesaid, to willfully, intentionally and unlawfully cease their work, and said persons did, pursuant to and by reason of said influencing and impelling by said defendants, intentionally, willfully and unlawfully cease their work in maintaining

and operating said coal mine for the production of coal therefrom, and such influencing and impelling of said persons by the defendants and said ceasing of work by said persons were for the purpose to hinder, delay, limit and suspend the continuous and efficient operation of said mine with reasonable continuity and efficiency for the mining and production of coal for and in common use as fuel for domestic, manufacturing and transportation purposes in Kansas, and for the purpose of evading the provisions of chapter 29, Special Session Laws of Kansas, 1920, and to obstruct, hinder and prevent the people of Kansas from living in peace and security, and from being supplied with coal and the necessaries of life, "and that such ceasing of work by said persons, who ceased said work as aforesaid, was not an individual quitting of work by said persons, or an individual act of said persons, for the purpose of exercising any individual right, but was for the unlawful purposes aforesaid."

The second count followed closely the allegations in the first count, but varied from it in alleging a conspiracy. It alleged that each of the defendants, intentionally, unlawfully and feloniously used the power, authority and influence of his position as an officer and president and vice president, respectively, of said labor union, and did willfully, intentionally, unlawfully and feloniously influence and impel the said Owen Pryor and said other persons named and unnamed, who were then engaged as workers and employed in the maintenance and operation of said Coal Mine H for the purposes aforesaid, "to intentionally, willfully, and unlawfully conspire with each other and with said defendants in said county and said state to, and such persons, so influenced and impelled by said defendants, pursuant to and by reason of said influence and impelling by said defendants and said conspiracy, did intentionally, willfully and unlawfully cease their work in maintaining and operating said coal mine for the production of coal therefrom, and said influencing and impelling of said persons

by said defendants and said conspiracy, acts and conduct of said persons were for the purpose to hinder, delay, interfere with, limit and suspend the operation of said mine for the mining and production of coal for and in common use as fuel for domestic, manufacturing and transportation purposes in the state of Kansas, and for the purpose of evading the provisions of chapter 29 of the Special Session Laws of Kansas, 1920, and to obstruct, hinder and prevent the people of the state of Kansas from living in peace and security, and from being supplied with coal and the necessaries of life, and that said ceasing of work by said persons who ceased work as aforesaid was not an individual quitting of employment by any of said persons, or an individual act of said persons, for the purpose of exercising any individual right, but was for the unlawful purpose aforesaid."

Each count charged, at the close, the said acts were contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Kansas.

Each count charged a felony under section 19 of the act, in that each defendant was alleged to have willfully used the power, authority and influence incident to his official position as an officer of the labor union, and by such means intentionally influenced and impelled certain other persons to violate the provisions of section 17 of the act. Each count, however, included allegations which charged a misdemeanor under section 17 of the act.

A statute of Kansas, which now appears as 62-1023, R. S. of Kansas, 1923, provides:

> "Upon the trial of an indictment for a felony, the defendant may be found guilty of any other felony or misdemeanor necessarily included in that with which he is charged in the indictment or information."

Under this statute a verdict and judgment were proper, finding and adjudging, respectively, the defendants guilty of a misdemeanor.

A motion to quash the information was filed June 27, 1921. (Rec.

17.) This motion was overruled June 27, 1921. (Rec. 19.) The trial of the case was begun June 27, and the verdict returned July 1, 1921. (Rec. 3, 4.)

The verdict of the jury, as to this defendant, omitting the caption, was as follows:

> "We, the jury, duly empaneled and sworn to try the issues joined in the above-entitled cause, do on our oaths find the defendant August Dorchy guilty of a misdemeanor, in that said defendant did willfully hinder, delay, limit and suspend the operation of Coal Mine H of the George K. Mackie Fuel Company, in violation of chapter 29 of the Laws of Kansas, of the Special Session 1920; committed all in manner and form as charged in the information in this case."

It was signed by the foreman. (Rec. 29.) The same form of verdict was returned against Alexander Howat, the other defendant, although it does not appear in this record.

A motion for new trial was filed and overruled. (Rec. 32, 33.)

On July 8, 1921, the Court, upon the verdicts of guilty, sentenced August Dorchy and his codefendant, Alexander Howat, each to confinement in the county jail in Cherokee county, Kansas, for the period of six months, and each to pay a fine to the state of Kansas in the sum of $500, and to pay the costs of the prosecution, and to be committed until said costs and fines were paid. (Rec. 4.) An appeal was taken by each of the two defendants, to the Supreme Court of the state of Kansas from the judgment of the District Court of Cherokee county. (Rec. 34, 35.) Alexander Howat dismissed his appeal, and afterwards sought to have it reinstated, and the reinstatement was refused; but these two steps of Howat do not appear in the record.

The judgment of the District Court of Cherokee county was affirmed by the Supreme Court of Kansas November 4, 1922, 112 Kan. 235. (Rec. 48, 49.) A petition for rehearing was filed in the Su-

preme Court of Kansas (Rec. 50), and was by it overruled. (Rec. 57.)

A petition for writ of error to the Supreme Court of the United States was filed in the Supreme Court of Kansas (Rec. 58), and an order allowing the writ of error was made by W. A. Johnston, chief justice of the Supreme Court of Kansas. (Rec. 60.)

A writ of error was issued, citation served, and the record transmitted to the Supreme Court of the United States. (Rec. 65-67.)

Mine H of the George K. Mackie Fuel Company, situated in Cherokee county, Kansas, was running prior to February 4, 1921, and producing coal for railroad and manufacturing purposes. It was located about three and a half miles northwest of Scammon. The mine produced from 140 to 146 tons of coal per day. The Fuel Company shipped coal from the mine to various points in Kansas for railroads and salt and packing plants. (Rec. 37, 38, 45, 46, 47.)

There were 46 men employed at the mine, who were members of the United Mine Workers of America. There was a full force on February 3. (Rec. 45, 47.)

The Local Union No. 498 met at Scammon on the night of February 3, 1921. Alexander Howat and August Dorchy were present. Howat produced a strike order and it was read to the meeting. Howat handed it to George Young, one of the workmen at Mine H. and a member and secretary and treasurer of the local union, and told Young to take it to the mine and read it in the morning. The next morning Young took the order to the mine, got there about 6:30 a. m., and read the order to the assembled miners, about 40 or 45 being present. The men all quit after reading the order, and Young notified the foreman, George Jenkins, there would be no work there that day and none until the Mishmash claim was paid; that he expected to stop the mine until the claim was paid. The strike was called for the purpose of collecting the Mishmash claim. Young

knew that the men would quit when he read the order to them, and that the mining operation would stop. (Rec. 44, 45, 37.)

The strike order, marked "Exhibit A," is set out at pages 36 and 37 of the record, and we quote it as follows:

PITTSBURG, KAN., February 3, 1921.

*To the Men Employed at the Mines of the Mackie Fuel Company:*

This is to advise you that we are authorized and directed by our executive board to notify you to cease work beginning Friday morning, February 4, 1921, until such time as the company pays Brother Carl Mishmash the amount of money due him in accordance with the settlement made by the joint board of miners and operators in this case. This case has been settled by the joint board of miners and operators, but the company refuses to comply with the settlement that has been made and refuses to pay Brother Mishmash any part of the money that is due him.

We sincerely hope that the men employed at the mines of this company will respond to the call of duty and stand united as one man until such time as this company carries out the agreement that has been made by the joint board of miners and operators. When we make a satisfactory settlement of the question in dispute you will be notified from this office of the same.

With kind regards, we are,

Yours very truly,

ALEXANDER HOWAT, *President District No. 14.*
AUGUST DORCHY, *Vice President.*

On the morning of February 4 the men employed by the company, 45 or 46 in number, assembled at the mine at about 6:30 and then left, carrying their dinner pails with them. (Rec. 45.) The men quit because of the strike order signed by Howat and Dorchy. This caused a stoppage of production. The Fuel Company could not replace the men. Some of the men came back for one day on February 9 to clean up the coal. They got their pay for the coal thus cleaned up in that way. On February 23 the men resumed work

and the mine resumed full operation. The foreman told Jack Morton, the superintendent of the mine, that the men quit work to collect the Mishmash claim. This amount, Morton understood, was $180. The money was paid to Mishmash by the Fuel Company, pursuant to order of the Industrial Court, and after that the men came back to work on February 23, 1921. (Rec. 47.) The miners quit for the purpose of forcing the company to pay the Mishmash claim, and they all went back to work after it was paid. (Rec. 45, 46, 47.)

George Young, one of the miners who stopped work, was secretary and treasurer of the local union of the United Mine Workers of America. He, together with John McNally, another one of the workers who stopped work, the two acting as a committee for the workmen, told George Jenkins, the foreman of the mine, on the morning of February 4, that the men had quit and that the mine would be shut down and that there would be no work there until the claim of the Mishmash boy was paid. (Rec. 38, 39, 40, 41, 42, 44, 45, 46.)

The whistle at the mine blew for the men to come to work on the morning of the 4th, the 5th and the 8th of February. (Rec. 39.) No work was done on or after February 4 until February 23, excepting some work of cleaning up coal, in order to get paid for the coal thus cleaned up by the miners, on February 9. (Rec. 39, 40.) On and after February 23 the mine was in operation again. (Rec. 40.)

Alexander Howat said to the court, in a statement before sentence, which statement Dorchy said he approved, that the strike order was made and the strike called by Howat and Dorchy to compel the George K. Mackie Fuel Company to pay the Mashmish claim. (Rec. 47.) No evidence was introduced by the defendant. (Rec. 47.) The record does not show that Carl Mishmash was employed by the Mackie Fuel Company at the time the strike was

called, or that Alexander Howat or August Dorchy were employed by the Fuel Company at any time. The facts are—and about them there can be no dispute, although not shown by the record—that Mishmash was not then and had not been employed by the Fuel Company for about a year and a half before the strike, and that Howat and Dorchy had never been employed by the Fuel Company.

Some details concerning this controversy about the claim of Carl Mishmash appear in the opinion in *State, ex rel., v. Howat*, 109 Kan. 376, 400, 401. That was the case where the Supreme Court of Kansas affirmed a judgment of the District Court of Crawford county punishing Howat, Dorchy and others for contempt for violating an injunction by calling a strike at two mines of the Mackie Fuel Company, one in Crawford county and the other in Cherokee county. The strike at one of those mines was the one here in question. And see *State of Kansas v. Howat (Dorchy)*, 116 Kan. 412, 414.

In the cases of Howat, Dorchy, Harvey and Foster against the State of Kansas, No. 154, at the October term of this Court, 1921, general number 27,944, and of Howat, Dorchy and others v. The State of Kansas, No. 491, at the same term, general number 28,446, the transcript of the record contained some further details concerning the Mishmash claim. It was there shown that, under the working agreement which existed between the coal companies and District No. 14 in that vicinity, Mishmash's pay at the work he was doing would have been $3.65 per day while he was under nineteen years of age, and $5 per day while he was over that age. On March 22, 1918, he first demanded of the superintendent of the mine pay at the higher rate from August 31, 1917, when he claimed to have reached the age of nineteen. The company paid him the higher rate of wages from April 1, 1918, and as long as he worked at the mine. (See record in those two cases, pages 36 and 37.) The amount in controversy was there stated to have been $225. There

were two conflicting entries in the Mishmash family Bible of the date of the birth of Carl Mishmash, one showing he was born August 31, 1898, and the other that he was born August 31, 1899. (See record in said two cases, pages 116 and 117, general numbers 27,944, and 28,446.) The Fuel Company relied upon the later date. This subject is referred to in the testimony of Alexander Howat in those two cases at pages 112-118, and 154.

To understand the reason for the enactment of the statute in question it is necessary to state the history of conditions in the coal-mining fields in Crawford and Cherokee counties, Kansas, for some time prior to the passage of the statute. This history does not appear in the record, but the legislature which enacted this statute knew this history and the Court will take judicial notice of it.

Of the coal produced in the state of Kansas, that mined in Crawford and Cherokee counties was about 93 per cent of the total coal consumption in the state. Coal was shipped in from Colorado, New Mexico, Oklahoma, Arkansas and Illinois, to fill out the supply required by the people of the state. The long extra haul on the transportation of this coal from other states added materially to its price and made its cost substantially higher than that of the coal produced in Kansas, allowing for differences in quality. The coal produced in the Crawford and Cherokee county fields was excellent for steaming purposes and was useful and in active demand for all purposes.

District No. 14, United Mine Workers of America, had at least nine thousand members in Kansas and two thousand members in that part of Missouri adjoining on the east Crawford and Cherokee counties, Kansas. All of the workers in the Kansas coal mines were members of the United Mine Workers of America, although those who worked in Leavenworth county belonged to another district than District No. 14. For years District No. 14 had controlled

and domineered over with recklessness and malice the coal-mining industry in Crawford and Cherokee counties. There was no equality between the mine operators and District No. 14. That district controlled the situation. At its will the operation of mines stopped or was resumed. In dealing as to wages, hours and working conditions the bargaining power of District No. 14 was far stronger than the bargaining power of all of the coal-mine operators in southeastern Kansas combined.

For about thirteen years prior to 1920 the number and frequency of strikes at coal mines in southeastern Kansas had been growing. Most of them were called on trifling pretexts, which varied in character. Strikes would be called and the mines affected shut down for a few days or few weeks.

A general strike at all the mines of the district was called November 1, 1919, and lasted until near the end of the year. It was part of a strike of bituminous coal miners throughout the country, for the purpose of obtaining a 60 per cent increase of wages, a six-hour day, and a five-day week. On this general strike President Wilson issued a public statement, in which he said:

> "From whatever angle the subject may be viewed, it is apparent that such a strike in such circumstances would be the most far-reaching plan ever presented in this country to limit the facilities of production and distribution of a necessity of life and thus indirectly to restrict the production and distribution of all the necessaries of life. A strike under these circumstances is not only unjustifiable, it is unlawful. . . . I feel it my duty in the public interest to declare that any attempt to carry out the purposes of this strike and thus to paralyze the industries of the country with the consequent suffering and distress of all our people, must be considered a great moral and a legal wrong against the government and the people of the United States."

New York *Times*, October 26, 1919, sec. 1, p. 1.
Strikes and the Law, by Philip Wager Lowry.
21 Columbia Law Review, 1921, p. 783.

What occurred is clearly stated in the opinion of the Supreme Court of the state in the case of *The State of Kansas, ex rel. Hopkins, Attorney-general, v. Alexander Howat et al.*, in which case August Dorchy was one of the defendants (109 Kan. 376, 401, 402, case No. 23,505):

> "Under this form of civil government there were 705 strikes in the coal mines of Kansas within a period of less than four years ending December 31, 1919. In the winter 1919-'20 the purposes of the national strike were attempted to be carried out in District No. 14. The threatened consequences were so dire that the state took action in this Court, under the anti-trust statute, and the Court appointed receivers for the coal mines. The receivers encountered difficulty in securing competent managing operators, because those who were familiar with the mines and methods of coal production in that district feared they might not survive an attempt to supply the people of the state with fuel. With splendid heroism, ex-service men, college students, and others of patriotic mold, volunteered to do the work. Prudence demanded they be given military protection, and a regiment of the Kansas National Guard was sent with them to the mines. General Wood also stationed a troop of regular army soldiers in the vicinity. On the way to Pittsburg, movement of the state troop train was insufferably delayed, until a sharp order to proceed was given. Then the train was wrecked. After the volunteers and their military escort arrived at Pittsburg some sniping occurred, but without fatality, some mining machinery was disabled, and some hidden stores of dynamite were discovered. The determined character of the coal-producing enterprise seems then to have been appreciated, and further violence was not offered. The sublimate cruelty of the strike method, however, was displayed in the treatment of the Pittsburg hospital. It was surrounded with coal mines. There were 15,000 idle miners in the district. The hospital was filled with sick, many of whom were miners, and the winter weather was severely cold. Coal was denied to this hospital by the strikers, although deprivations for a single day meant death to patients."

As a result of the state's intervention some coal was produced from strip mines, which to some extent alleviated the distress from

the shortage of the coal supply. The strike being general, the supply of coal from outside of the state was at the same time practically eliminated.

When the legislature met in special session in January, 1920, it went into a full investigation of the situation, at which information was furnished and arguments were made from all sides of the controversy, including, among others, the coal-mine operators and the coal miners, and as a result it enacted the statute in question. Part of the information before it was that during the period from April 1, 1916, to December 31, 1919, a period of forty-five months, there were 705 strikes in the territory within the jurisdiction of District No. 14, United Mine Workers of America, in Crawford and Cherokee counties, Kansas. Most of these strikes were called without any but a trifling pretext. As a result the employees lost 799,194 working days and $3,866,780.24 in wages, and gained in money concessions $852.83. The strike of November and December, 1919, while larger in its scope than the prior strikes, which had been steadily increasing for years, was merely the culmination of the scheme of District No. 14 and its officers to dominate and control the coal industry of southeastern Kansas, and determine when and under what conditions mines could operate and when the people of the state might be supplied with coal and when they should be deprived of coal, when the industries of the state might operate, and when they must stop operation for lack of coal.

The situation in November and December, 1919, was more acute than it had formerly been, but it was part of a chronic and increasing evil and danger to the state.

July 1, 1919, a strike was called by the order of Alexander Howat, president of District No. 14 of United Mine Workers of America, of the mine workers at the mines of the Central Coal and Coke Company in the southeastern Kansas mining district. Nine hun-

dred and twenty-five men struck and the mines were shut down for about six months. No reason was ever given for this strike, on behalf of the strikers, to the Central Coal and Coke Company. The State Labor Commissioner, and *ex officio* mine inspector, endeavored in vain to ascertain from Alexander Howat the occasion for the calling of the strike.

The only miners in the district were members of District No. 14, United Mine Workers of America. At each mine there was a local union, and no man could be employed as a miner thereat unless he was admitted to membership in the local union, which as a result controlled the employment of men at the mine. As a result of careless mining work by the employees, the amount of slack produced in these mines in southeastern Kansas increased from about 25 per cent, which it had been in 1916, to about 50 per cent, which it was in 1919. Slack coal, of course, was less valuable than the lump and nut coal and sold for a much lower price. The result was to increase the price of lump and nut coal and lessen the utility of the total coal mined. In 1922 and 1923 the percentage of slack coal had been reduced to about 35 per cent.

With the history before it, the legislature enacted the statute.

Questions concerning the validity of provisions of the statute were soon before the local courts and the Supreme Court.

On April 9, 1920, Alexander Howat, August Dorchy and two others were adjudged guilty of contempt by the District Court of Crawford county, for failing to obey the order of the District Court requiring them to appear as witnesses before the Court of Industrial Relations in an investigation by it relating to conditions existing in the mining industry in Cherokee and Crawford counties. They were committed to jail until they should submit to be sworn and testify in the proceedings, and they appealed to the Supreme Court

of the state. The opinion of that Court, sustaining the act against the points raised against it, appears in 107 Kan. 423, case No. 23,013.

April 5, 1920, an action was brought by the state, on the relation of the attorney-general, in the District Court of Crawford county, Kansas, against the officers of District No. 14 of the United Mine Workers of America, including Alexander Howat, president, August Dorchy, vice president, and others, to enjoin them from interfering with the operation of coal mines in Crawford, Cherokee and Osage counties, Kansas, and causing the production of coal to be delayed, hindered and stopped. September 14, 1920, the District Court of Crawford county issued a permanent injunction against those defendants, restraining them, among other things, from directing, ordering, or in any manner bringing about the hindering, delaying, interference with or suspension of the operation of any coal mines in those counties, and from causing the miners or members of that labor union to quit their work at said mines for the purpose of hindering, delaying, interfering with or suspending the operation of any coal mines in those counties. On February 3, 1921, those defendants called the strike in question at Mine H of the Mackie Fuel Company in Cherokee county, and also at another mine of the same company situated in Crawford county. On February 7, 1921, an affidavit was filed by the attorney-general and county attorney in Crawford county, charging those defendants with contempt of court in violating the injunction, and after notice, the filing of an accusation against the defendants, and a hearing, the court found these defendants, including Howat and Dorchy, to be guilty of a violation of the injunction and contempt of court, and ordered that they be confined in the county jail of Crawford county for one year, and to pay the costs of prosecution. The opinion appears in *The State of Kansas, ex rel. Hopkins, Attorney-general, v. Howat et al.*, 109 Kan. 376. In the opinion the court said:

"The constitution and by-laws of District No. 14 had been amended to impose a fine of $50 for each offense, on any member, committee or local officer who would be privy to referring a controversy to the Court of Industrial Relations, and imposing a fine of $5,000 on any district officer of District No. 14 who would be a party to the reference of any grievance to the Court of Industrial Relations. These amendments enabled Howat and his associates to impose their will on mine workers. Without continuous and effective operation of the coal mines, all the loss, suffering and irreparable injury of the coal strike of December, 1919, fresh in the minds of the people and of the defendants, would be repeated; and the state was without adequate remedy at law." (pp. 379, 380 *id.*)

The Supreme Court also said, referring to the District Court:

"The Court found that all the perils to the public welfare which accompanied the coal strike of the winter of 1919-'20 would again be incurred. That strike caused industry to stop, caused commerce to be demoralized, caused food supplies to be reduced and cut off, caused schools to close, caused suffering in homes; and if the defendants had been permitted to have their way, would have caused the sick to languish and die in unwarmed hospital beds in the dead of winter. If those consequences were produced in a single village by blocking the highway over which necessaries of life were brought in, anybody would say blocking the highway was a public nuisance and a court of equity could open the road. Multiplicity and magnitude of threatened disaster do not detract from the authority of the court of equity over the few determined individuals who propose to wreak the disaster. Ability of the defendants to paralyze the normal activities of a whole commonwealth would not free them from amenability to injunction. The district court was warranted in interfering on principles identical with those applied in abatement of public nuisances, and the court was not shorn of power because the defendants, if they persisted, would incidentally be guilty of crime."

The Supreme Court of the state also held that the injunction was rightfully issued, on the ground that the state, by the calling of the strikes in the coal mines, would be prejudiced in the use of property which it held as owner; that is, that it could not get coal

for the various educational, charitable and correctional institutions owned and maintained by the state. (p. 386 *id.*)

The injunction was sustained on the general equity power of the court and the protective power of the state, independently of the statute in question.

The judgment of the District Court in the case above referred to, in 107 Kan. 423, and that in 109 Kan. 376, having been sustained by the Supreme Court of the state, writs of error were taken to this Court.

The two cases were heard together in this Court and a decision rendered March 13, 1922:

*Alexander Howat, August Dorchy, Thomas Harvey and Robert B. Foster v. State of Kansas* (No. 154).

*Alexander Howat, August Dorchy, James McIlwrath, et al., v. State of Kansas* (No. 491), 258 U. S. 181; 66 L. Ed. 550, 42 Sup. Ct. R. 277.

The writs of error were dismissed.

Alexander Howat and August Dorchy and other officers of District No. 14, having called a strike about March 21, 1921, at a strip mine of the Patton Coal and Mining Company in Crawford county, Kansas, to compel the company to operate at the mine two steam shovels and two crews of men instead of one steam shovel and one crew of men, the Court, on April 8, 1921, found Alexander Howat guilty of contempt for violation of the injunction which had been issued by the Court September 14, 1920, hereinbefore referred to, and fined him. He took an appeal to the Supreme Court of the state, and that court affirmed the judgment of the District Court. The opinion was filed November 12, 1921.

*The State of Kansas, ex rel. Hopkins, Attorney-general, v. Alexander Howat et al.*, 109 Kan. 779 (No. 23,573).

The Industrial Court Act has not been repealed. In the Revised Statutes of Kansas, 1923, it appears as sections 44-601 to 628, in-

clusive, and sections 74-701 to 703, inclusive, section 66-102 and section 74-602.

By section 2, chapter 258, Session Laws of Kansas, 1925, the jurisdiction which had theretofore been exercised by the Court of Industrial Relations was vested in the Public ~~Utilities~~ Service Commission.

# ARGUMENT.

The propositions of the State are as follows:

I.

THE ONLY ASSIGNMENTS OF ERROR WHICH THE COURT SHOULD CONSIDER.

II.

THE SPECIFICATIONS OF ERROR DO NOT FOLLOW THE ASSIGNMENTS OF ERROR.

III.

THE STRIKERS DID NOT ABANDON THEIR JOBS.

IV.

THE STATUTE DOES NOT FORBID THE ABANDONMENT OF JOBS.

V.

THERE IS NO QUESTION OF COMPULSORY ... RATION IN THIS CASE.

VI.

THE SUPREME COURT OF KANSAS HAVING HELD SECTION 19 OF THE ACT TO BE INDEPENDENT, THERE IS NO QUESTION HERE OF THE VALIDITY OF THE PROVISIONS OF THE ACT CONCERNING THE FIXING OF WAGES AND HOURS BY THE INDUSTRIAL COURT.

VII.

THE CONSTITUTIONAL RIGHTS OF PLAINTIFF IN ERROR HAVE NOT BEEN INVADED, AND HE CANNOT MAINTAIN THE POINTS SET OUT IN HIS BRIEF.

VIII.

THE PUBLIC HAS AN INTEREST IN THE MINING OF COAL IN KANSAS, FOR THE PURPOSE OF PREVENTING STRIKES.

IX.

THE PUBLIC INJURY BY STOPPING THE OPERATION OF A COAL MINE THROUGH A STRIKE IS SUCH THAT A STRIKE MAY BE PROHIBITED.

X.

THERE IS NO ARBITRARY OR UNREASONABLE DISCRIMINATION IN THE INDUSTRIAL COURT ACT. THE CLASSIFICATION IS VALID UNDER THE FOURTEENTH AMENDMENT.

XI.

THE STATUTE IS NOT ARBITRARY.

XII.

THE STATUTE, NOT BEING ARBITRARY, SHOULD NOT BE HELD INVALID.

XIII.

THE RULE WHICH PERMITS STRIKES UNDER SOME CIRCUMSTANCES IS ONE OF ECONOMICS AND PUBLIC POLICY AND NOT OF CONSTITUTIONAL RIGHT.

XIV.

THE EVILS OF STRIKES HAVE BEEN RECOGNIZED BY CONGRESS AND MANY LEGISLATURES.

XV.

THE STRIKE ATTACKED THE CONSTITUTIONAL AS WELL AS THE LEGAL RIGHTS OF THE MACKIE FUEL COMPANY AND ITS CUSTOMERS.

XVI.

AN ACT LAWFUL FOR ONE MAY BE UNLAWFUL FOR SEVERAL.

XVII.

THE STRIKE WAS UNLAWFUL UNDER THE DECISIONS.

XVIII.

HOWAT AND DORCHY IN CALLING THE STRIKE DID NOT EXERCISE ANY LIBERTY, BUT COMMITTED AN ACT OF OPPRESSION AGAINST THE GEORGE K. MACKIE FUEL COMPANY.

XIX.

THE STRIKE WAS ILLEGAL IN ANY VIEW.

## I.

## The Only Assignments of Error Which the Court Should Consider.

The references under this heading are made to the transcript of record in this case which was No. 491, October term, 1925, and is No. 119, October term, 1926, general No. 31,212. It is the transcript of record on the present writ of error.

Assignment I (Rec. 17) specifies that Dorchy had been deprived of his rights of personal liberty and freedom of contract under the Fourteenth Amendment, in that by the last decision of the Supreme Court of Kansas it was held that numerous and valid sections of the Industrial Court Act did not destroy or render invalid the whole act, and that such decision is in conflict with the previous decisions of the state of Kansas and of the Supreme Court of the United States, and that therefore the Supreme Court of Kansas erred in holding the decision of the District Court of Cherokee county, Kansas, did not violate the Fourteenth Amendment.

The judgment of the Supreme Court of Kansas referred to is in *The State of Kansas, Appellee, v. Howat et al. (August Dorchy, Appellant)*, 116 Kan. 412, opinion filed July 5, 1924. That is the judgment on account of which this writ of error was issued.

In the case of *August Dorchy, Plaintiff in Error, v. State of Kansas*, 264 U. S. 286, 291, 68 L. Ed. 686, decided March 10, 1924, the judgment of the Supreme Court of Kansas was reversed in order that it might pass upon the question whether section 19 of the act remained in effect after the decision by this Court in the case of *The Charles Wolff Packing Company v. Court of Industrial Relations*, 262 U. S. 522, 67 L. Ed. 1103. The Court said:

> "The task of determining the intention of the state legislature in this respect, like the usual function of a state statute, rests primarily upon the state court. Its decision as to the severability of a decision is conclusive upon this court. . . .

> "In cases coming from the state courts, this Court, in the absence of a controlling state decision, may in passing upon the claim under the Federal law, decide, also, the question of severability. But it is not obliged to do so. The situation may be such as to make it appropriate to leave the determination of the question to the state court. We think that course should be followed in this case."

The Supreme Court of Kansas, when the case came before it after that reversal, held in 116 Kan. 412, that by virtue of section 28 of the Industrial Court Act, section 19 is so far severable from the provisions relating to fixing wages that it is to be regarded as having the legal effect of an independent statute, "making it a punishable offense for an officer of a labor union, acting in his official capacity, to call a strike of coal miners, whereby operation of the coal mine, in the production of coal, is suspended." The quotation is from the syllabus.

The case having been reversed for the purpose of the Supreme Court of Kansas passing upon the question of the severability of section 19 of the act from those concerning the fixing of wages, and that Court having held section 19 to be severable and to be in effect, there is no ground for an assignment of error upon that point.

Assignment II (Rec. 1) raises this severability question in other language, and says that the Supreme Court of Kansas erred in holding that sections sought to be applied to Dorchy were not violative of the Constitution of the United States and were severable from unconstitutional sections or provisions.

The same remarks apply on the question of severability to Assignment II that we have made with regard to Assignment I. In addition the sections which are charged to be violative of the Constitution and to be applied to Dorchy are not specified.

Assignment III (Rec. 1) states that the decision of the Supreme Court of Kansas is erroneous in that it seeks to compel involuntary

servitude and compulsory arbitration upon the part of the petitioner and to punish him for calling a strike, whereas by the previous decision of this Court in this cause (*Dorchy v. State of Kansas*, 264 U. S. 286, 68 L. Ed. 686) it was held that the prior decision of the Supreme Court of Kansas and provisions of the Industrial Court Act sought to be applied to the petitioner contravene the Constitution of the United States in respect to involuntary servitude and compulsory arbitration and the calling of a strike.

The previous decision of this Court referred to did not make any such holding as is set forth in Assignment III. There could be no question of involuntary servitude with respect to Dorchy for he was not an employee of the Mackie Fuel Company. There could be no question of compulsory arbitration, because there was no controversy between Dorchy and the Mackie Fuel Company. The calling of the strike by Dorchy was not held by this Court to be in violation of the Federal Constitution.

Assignment IV (Rec. 18) states that the last decision of the Supreme Court of Kansas is erroneous in that it is at variance with the decisions of this Court in the case of *Wolff Packing Company v. Industrial Court*, 262 U. S. 522, and *Dorchy v. Kansas*, 264 U. S. 286, and other decisions of this Court, as to the right of the legislature of Kansas to interfere with personal liberty, regulation of wages, freedom of contract, the right to strike, the right to peacefully picket, and immunity from involuntary servitude under the Constitution of the United States.

This Court in *Dorchy v. Kansas*, 264 U. S. 286, did not make any holding on the question of constitutionality. In the case of *The Wolff Packing Company v. The Industrial Court*, 262 U. S. 522, there was no question before the Court of the right to strike or to picket. In this case there can be no question under the facts with regard to involuntary servitude. No contract of Dorchy was in question in this case.

Assignment V (Rec. 18) states that the decision of the Supreme Court of Kansas is erroneous, for the reason that it violates section 1 of the Thirteenth Amendment to the United States Constitution. This section is against slavery and involuntary servitude and cannot be invoked as a protection to Dorchy's actions in the case.

Assignment VI (Rec. 18) appeals to section 1 of the Fifteenth Amendment to the United States Constitution. This refers to the right to vote and has no relation to this case.

Assignment VII (Rec. 18) asserts that the Supreme Court of Kansas erred in ordering that the judgment of the District Court of Cherokee county be enforced against the plaintiff in error, for the reason that said judgment was reversed by this Court by its decision of March 10, 1924. That judgment of reversal was only for the purpose of having the Supreme Court of Kansas pass upon the question of the severability of section 19 of the act, taking into account section 28 of the act, which relates to severability. The Supreme Court of Kansas having held that section 19 was severable, the proper judgment for it to render was to direct that the District Court of Cherokee county enforce its judgment against the plaintiff in error.

Assignment VIII (Rec. 18) does not invoke the Constitution of the United States, or any provision thereof.

Assignment IX (Rec. 19) refers to the due process clause of the Fourteenth Amendment to the United States Constitution. To the question of practice by this assignment we have no objection.

Assignment X (Rec. 19) is as follows:

> "The decision of the Supreme Court of Kansas is in error in deciding that the legislature of the state of Kansas may make it a crime to strike, picket, or, as an officer of a labor organization, to compel, or impel, or direct others to strike, or to peacefully picket, and that the conviction and sentence of this petitioner in this cause was not a violation of his right of freedom of

speech as guaranteed to him under the Constitution of the United States."

As a matter of practice we have no objection to the raising of the question concerning the validity of section 19 as applied to the actions of Dorchy in this case, but we object to the raising of the question as to picketing or as to freedom of speech. There was no picketing in this case. The Mackie Fuel Company could not have operated its mine without the protection of a force of National Guard or of deputy sheriffs, and it did not undertake to operate its mine under such conditions. The strength of organization and the danger from the hostile power of District No. 14 made picketing unnecessary.

There is no question of freedom of speech here, because what took place was an action impelled by the order issued by Howat and Dorchy. The order was intended to be obeyed, and it was obeyed. The operation of the mine was stopped.

Assignment XI (Rec. 19) contains two elements; one asserts that the decision of the Supreme Court of Kansas is erroneous in holding that the petitioner can be punished under the criminal provisions of the Industrial Court Act for calling the strike, and that said criminal sections are in violation of the Constitution of the United States.

To that as a matter of practice we have no objection.

The remainder of this assignment asserts that the decision of the Supreme Court of Kansas is in error in holding the criminal sections severable from other sections which have been held unconstitutional.

The question of severability was left by this Court to the decision of the Supreme Court of Kansas, and the Supreme Court of Kansas has held section 19 severable. There can be no constitutional question here on that point.

## II.

## The Specifications of Error Do Not Follow the Assignments of Error.

The specifications of error are set out at pages six and seven of the brief of plaintiff in error.

The second specification states that the District Court of Cherokee county was without authority to adjudge plaintiff in error guilty of a violation of section 3 of the Industrial Court Act for the reason that the mining of coal is not clothed with a public interest. There is no assignment of error either with reference to section 3 or with reference to the question of the mining of coal being not clothed with a public interest.

The third specification states that, as the mining of coal is not affected with a public interest, there was no violation of section 17 of the Industrial Court Act by the order of the executive board of District No. 14. That is a question as to the application of section 17. There is no assignment of error on the point. Whether or not the acts of Dorchy came within section 17 is a state question and not a constitutional one.

The fourth specification states that the District Court of Cherokee county was without jurisdiction to render its judgment under section 18 of the Industrial Court Act, as the plaintiff in error was not guilty of a misdemeanor or any other crime. There is no assignment on this point. The question whether the act of plaintiff came within the purview of section 18 is a state subject. This Court deals only with whether an act is unconstitutional.

The sixth specification states that, as the case of *Dorchy v. Kansas*, 264 U. S. 286, held that compulsory arbitration is unconstitutional as applied to the coal mines in Kansas, the Supreme Court of Kansas erred in its judgment; that the calling of a strike was a violation of section 19 of the Industrial Court Act. There is no as-

signment on that point. There is no question of compulsory arbitration in this case.

## III.

## The Strikers Did Not Abandon Their Jobs.

Under the order issued by Howat and Dorchy on February 3, 1921, the employees at the mine were to cease work until the company paid the Mishmash claim. They were to stand united as one man, and when a satisfactory settlement should be made, they would be notified from the office of the president of District No. 14. (Rec. General No. 29,279, p. 36) Young, one of the employees, secretary and treasurer of the local union of District No. 14, who read the order to the men at the mine on the morning of February 4, told George Jenkins, the mine foreman, there would be no work at the mine until the Mishmash claim was paid. (Same record, 37, 38, 40, 41, 42.) The day man and all but one of the diggers worked one day, February 9, cleaning up some coal which had been blasted. (Same record, 39.) This was in order to get their pay for that coal, and it was obviously with the approval of Howat and Dorchy and the other strikers. The Mishmash claim having been paid, the men resumed their work on February 23, 1921. (Same record, 41, 42.) They did not intend to quit their jobs. Combining with Howat and Dorchy they intended to coerce the Mackie Fuel Company to pay the Mishmash claim, not to operate the mine until it was paid, and when that was done the strikers would go back to work. The Mackie Fuel Company must reëmploy them. This was not an exercise of liberty by the employees, but it was an injury deliberately inflicted upon the Fuel Company to compel it to obey the order of Howat and Dorchy, backed by District No. 14.

## IV.

### The Statute Does Not Forbid the Abandonment of Jobs.

Section 17, chapter 29, Laws of Kansas, Special Session, 1920, contains this statement:

> "*Providing*, That nothing in this act shall be construed as restricting the right of any individual employee engaged in the operation of any such industry, employment, public utility, or common carrier to quit his employment at any time."

In *The State of Kansas v. Howat et al.*, 109 Kan. 376, 416, the Court affirmed a judgment of the District Court of Crawford county, Kansas, punishing Howat and others, including August Dorchy, for contempt, in violating an injunction of the District Court against their calling a strike at coal mines. The strikes there in question included the one here being considered. The Court said, at page 416 *id.*:

> "The statute expressly guards the privilege of any employee to quit his employment at any time. He may quit before controversy arises, when controversy arises, while controversy is raging, and after controversy has been adjusted. As many others as desire may do likewise, and they may do so as the result of mutual-interest consultations."

In the last opinion of the Supreme Court of Kansas upon its judgment here in question, *State of Kansas v. Dorchy*, 116 Kan. 412, 416, the Court quoted and reaffirmed the above statement.

## V.

### There is No Question of Compulsory Arbitration in this Case.

There was no dispute between the workers at the mine of the Mackie Fuel Company and that Company. There was no dispute between Dorchy and that Company. The Mackie Fuel Company was not seeking any arbitration, neither were the workers, Dorchy, or Howat. Dorchy and Howat, backed by District No. 14, undertook to pass judgment upon the Mishmash claim and to enforce the

judgment by the strike. The holdings in the Wolff Packing Company cases were upon the question of the power of the Industrial Court to fix wages and hours.

*Charles Wolff Packing Co. v. Court of Industrial Relations*, 262 U. S. 522.

*Charles Wolff Packing Co. v. Court of Industrial Relations*, 267 U. S. 552.

Section 19 of the act, punishing strike, has been held to be severable by the Supreme Court of Kansas. The decisions in the two Wolff Packing Company cases, therefore, have no bearing upon the question of the right to punish the calling of a strike here presented.

## VI.

### The Supreme Court of Kansas Having Held Section 19 of the Act to Be Independent, There is No Question Here of the Validity of the Provisions of the Act Concerning the Fixing of Wages and Hours by the Industrial Court.

In the case of *Dorchy v. State of Kansas*, 264 U. S. 286, the judgment of the Supreme Court of Kansas was reversed for the sole purpose of having it pass upon the question whether section 19 of the act was severable. The question was left to the determination of that Court. The Supreme Court of Kansas has held that section 19 of the act is severable, that it stands alone, dissociated from the provisions relating to fixing wages, and necessarily hours, and is to be regarded as having the legal effect of an independent statute, "making it a punishable offense for an officer of a labor union, acting in his official capacity, to call a strike of coal miners, whereby operation of a coal mine, in the production of coal, is suspended." We quote from the syllabus, *State of Kansas v. Howat (August Dorchy)*, 116 Kan. 412.

The Court, at pages 415 and 416 of its opinion, said:

> "The legislature did know that strikes in the coal mines closed public institutions, stopped public and private business, caused

suffering in homes, and threatened death to patients in hospitals. In addition to providing a method of settling disputes affecting production of coal, striking and picketing were dealt with in sections 17 and 18. The right of any individual worker, however, to leave his employment at any time and for any reason was expressly recognized. In the case of *The State, ex rel., v. Howat*, 109 Kan. 376, 198 Pac. 686, the court said:

" 'The statute expressly guards the privilege of any employee to quit his employment at any time. He may quit before controversy arises, when controversy arises, while controversy is raging, and after controversy has been adjusted. As many others as desire may do likewise, and they may do so as the result of mutual-interest consultations.' (p. 416.)

"In his message to the legislature the governor said:

" 'While these tragedies were impending, the state, through a receivership ordered by the Supreme Court, took charge of the mines and spent a week urging the miners to return to work for the state, to relieve the public from the menace of the famine. A proposal similar to the one they accepted several weeks later at Indianapolis was made to them by the state of Kansas. Many miners expressed the desire to accept it, but the leaders refused to allow them to return to work. A large number of miners expressed to me their desire to work, their lack of sympathy with the effort to freeze the public; but said that if they should go back to work their property would be in peril, their families humiliated, and their very lives endangered.' (Senate Journal, Special Session 1920, p. 6.)

"To free labor-union members from tyrannical domination by ruthless labor leaders, prevent meddlesome interference with the relation between employer and employee, and so secure continuity in production of coal, section 19 was inserted in the law."

The purpose to be attained by section 19 was to prevent the losses, hardships and sufferings to the public by a stoppage of the operation of coal mines.

The quotation from the governor's message given in the opinion shows that, if the individual miners had come to work during the strike of November and December, 1919, their lives would have been in danger. Such a condition is intolerable.

The question of severability of section 19 having been left by this Court to the Supreme Court of Kansas, and that Court having held

it to be severable, questions as to the invalidity of the provisions authorizing the Industrial Court to fix wages and hours are outside of this case. The holding of the Supreme Court of Kansas is therefore controlling, even though a different view as to its severability might have been intimated in the opinion of this Court in *Charles Wolff Packing Company v. The State of Kansas*, 267 U. S. 552, 568, 569.

The statement in the opinion of this Court, by Mr. Chief Justice Taft, in *Charles Wolff Packing Company v. Court of Industrial Relations of the State of Kansas*, 262 U. S. 522, 540, on the subject of a possible strike was merely by way of a discussion, and was not a decided point. The point decided in that case was that the state could not vest the Industrial Court with authority to fix wages at the packing plant.

Section 19 having been held by the Supreme Court of Kansas to be an independent statute, the statements in the opinions in the two Wolff Packing Company cases in this Court as to the general purposes of the entire statute have no application to the question now before the Court.

## VII.

## The Constitutional Rights of Plaintiff in Error Have Not Been Invaded and He Cannot Maintain the Points Set Out in His Brief.

It has been decided by this Court many times that a plaintiff in error can be heard to object only to such parts of an act or proceedings taken as affect him personally. He is not permitted to raise generally the unconstitutionality of an act of congress or of the legislature of a state because it has or may affect some other person.

*Smiley v. Kansas*, 196 U. S. 447, 25 Sup. Ct. 289.

*Interstate Commerce Commission v. Chicago, R. I. & P. R. Co.*, 218 U. S. 88, 30 Sup. Ct. 659.

*Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 42 Sup. Ct. 106, 108.

*Massachusetts v. Mellon*, 262 U. S. 447, 43 Sup. Ct. 601.

*Rindge Co. v. Los Angeles Co.*, 262 U. S. 700, 43 Sup. Ct. 689, 693.

Dorchy was charged with violating section 19 of the Industrial Court Act, which makes it a felony for an officer of a labor union who shall willfully use the power, authority or influence incident to his official position to influence, impel or compel any other person to violate any of the provisions of the Industrial Court Act. The charge of a misdemeanor under section 17 of the Act was embraced within section 19. Under the statute which has been republished as 62-1022, Revised Statutes of Kansas, 1923, the jury were permitted to find the defendant guilty of an inferior degree of offense, under a charge of a felony. They found Dorchy guilty of a misdemeanor. Our theory, when this case was here before, was that he was found guilty under section 17, but the verdict can be considered as a finding under section 19. Dorchy was not an employee of the Mackie Fuel Company. He was a meddler, and upon a point which was not a controversy between Dorchy or any of the employees and the Mackie Fuel Company. It was a controversy between Mishmash, a former employee of the Company, who had not worked for it for a year and a half before the strike, and the Fuel Company, concerning the age of Mishmash during the period between August 31, 1917, and April 1, 1918. If he was over nineteen years of age during that time, he was entitled to have received pay for the work he did at the rate of $5 per day. If he was under nineteen years of age, the pay that he actually received for that period, of $3.65 per day, was sufficient.

It was no exercise of liberty on the part of Dorchy and others to set themselves up as a court to pass upon the contention and to enforce their judgment by means of a strike. There was no question

of freedom of speech. There was not merely speech but action in the calling and carrying out of the strike. The calling of the strike was to cause that action.

Freedom of speech is not protected against a state statute by any provision of the United States Constitution.

*Prudential Insurance Company v. Cheek*, 259 U. S. 530, 538, 542, 543, 66 L. Ed. 1044, 1052, 1053.

There can be no question of involuntary servitude as to Dorchy.

Questions as to the constitution or validity of provisions of the act concerning the fixing of wages and hours of labor by the Industrial Court do not affect Dorchy in any way. He can be heard to object to the constitutionality of this statute only in so far as it affects his right as an outsider to induce a strike in a mine in which he was not employed, for the purpose of compelling the payment, without resort to the courts, of the disputed claim of Mishmash, an ex-employee.

## VIII.

## The Public Has an Interest in the Mining of Coal in Kansas, for the Purpose of Preventing Strikes.

There may be different kinds of public interest in an industry, and in each kind the nature and extent of the power which a state may exercise over the conduct of an industry will depend upon the character of that particular public interest.

In the case of *Charles Wolff Packing Company v. Court of Industrial Relations*, 262 U. S. 522, 67 L. Ed. 1103, the Court held that the provisions of the statute conferring upon the Industrial Court the power to fix wages in the packing plant of the Wolff Packing Company were in violation of some provisions in the Fourteenth Amendment. In the case of the *Charles Wolff Packing Company v. Court of Industrial Relations*, 267 U. S. 552, 69 L. Ed. 785, the

Court made a similar holding on the question of the fixing of hours of labor at that packing plant.

In the first Wolff Packing Company opinion, 262 U. S. 522, 537, the Court said:

> "It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the woodchopper, the mining operator, or the miner, was clothed with such a public interest that the price of his product or his wages could be fixed by state regulation."

When this case was here before, the Court said:

> "After the judgment under review was entered in the Supreme Court of Kansas, this Court declared in the Charles Wolff Packing Company case, *supra*, p. 544, that the system of compulsory arbitration applying to packing plants violates the Federal Constitution. For the reasons there set forth, it is unconstitutional, also, as applied to the coal mines of that state." (264 U. S. 289.)

In neither of the two Wolff Packing Company cases was it said that there was no public interest in the coal-mining business generally. Applying those decisions to coal mining, the only deduction can be that there is no public interest in the coal-mining business for the purpose of fixing wages or hours. It is to be noted, however, that on the question of hours there might be a different question in the coal-mining business from that in the packing business.

In the first Wolff Packing Company opinion, 262 U. S. 522, 539, the Court said:

> "To say that a business is clothed with a public interest is not to determine what regulation may be permissible in view of the private rights of the owner. . . . The extent to which regulation may reasonably go varies with different kinds of business."

The Court in that case divided businesses clothed with a public interest into three classes. The first includes only public utilities. The second, those to which the public interest was recognized as

attaching from the earliest times, and survived the period of arbitrary laws by parliament or colonial legislators of regulating of trades and callings. The third covers businesses which were not public at their inception but may be said to have risen to be such, and in consequence to have become subject to some government regulation. That the owner by devoting his business to the public use in effect grants the public an interest in that use and subjects himself to public regulations to the extent of that interest. This Court did not hold that the business of the Wolff Packing Company, the preparation of meat products, was not in the third class. The Court said in 262 U. S., at page 539:

> "We are relieved from considering and deciding definitely whether preparation of food should be put in the third class of quasi public businesses, noted above, because, even so, the valid regulation to which it might be subjected as such would not include what this act attempts."

Later in the opinion the court said that the classification of the business of the Wolff Packing Company as public is at the best doubtful. (262 U. S. 543, 544.)

The conduct of the public institutions of the state and of its municipalities, transportation and other public utilities, manufacturing industries of all kinds, the use of coal for heating and domestic purposes, are so dependent upon the supply of coal from mines, and the injury by a cramping or cutting off of the supply is so great that there is a public interest in the business, at least to the extent of preventing a malicious interruption of the conduct of mining coal. Because the business of mining coal may not have been affected by a public interest two or three hundred years ago does not determine that it may not be affected by a public interest to-day. Conditions have changed, and this Court has recognized similar changes.

There had been for years a serious restriction upon the mining of coal in the southeastern Kansas field, caused by the numerous strikes called by District No. 14.

The suffering, hardships and losses caused by the coal strike of November and December, 1919, were so great as to lead the governor to call for volunteers to dig coal at the strip mines in southeastern Kansas, and thousands of persons volunteered for the purpose. Many of them were called and went to work at the strip mines and turned out coal, while the strike lasted, under the protection of a large force of National Guard. That is an instance of the nature of the public interest in the coal-mining industry.

The business of mining coal is of such public interest that congress created a coal commission to investigate the subject, and in its first report, January 15, 1923 (Sixty-seventh Congress, 4th Session, House Document No. 533), that commission says:

> "The coal problem begins with contradiction. Rich beyond all other nations in its wealth of coal resources, the United States experiences coal shortages and high prices. The coal deposits of the country are abundant and well distributed. Coal of every variety from anthracite to lignite underlies the hills and plains and mountains in beds whose content is measured by thousands of billions of tons, so that coal of a quality and in quantity that would be regarded as important by most other nations is found in all but thirteen states of the Union, and commercial mines are being operated in twenty-nine states.
>
> "Yet, with resources of coal in the ground adequate for the needs of perhaps a hundred generations of Americans, the nation's coal bin is too often depleted, and too often the prices paid for coal are much higher than seem warranted by the wealth of coal available.
>
> "There have been during the last six years three periods when shortage in the supply of coal has given rise to acute national concern. These recurring periods of scarcity have increased the cost of this basic commodity—increases especially serious to domestic consumers, railroads, and public utilities. These experiences of unsatisfied demand and unsatisfactory prices

have created in the popular mind a conviction that the natural benefits to be expected from a condition of plenty have been denied through artificial interference. The coal industry, therefore, has been subjected to outspoken criticism, and public dissatisfaction has expressed itself in a series of investigations and in regulatory laws.

"The act creating the United States Coal Commission is an expression of this feeling of public concern and dissatisfaction."

Later, in the same report, the commission says:

"The commission believes that the public interest in coal raises fundamental questions of the relation of this industry to the nation and of the degree to which private right must yield to public welfare. It may be that both private property in an exhaustible resource and labor in a public-service industry must submit to certain modifications of their private rights, receiving in return certain guaranties and privileges not accorded to purely private business or persons in private employ."

In its report of July 5, 1923 (Senate Doc. 195, part 1, 68th Congress, second session, pp. 1, 2), the commission says:

"Coal is quite as much a public necessity as gas, street railway service, or any other service or commodity that has been brought under public regulation. There should be no secrets from the public in regard to mining costs, profits, salaries, wages, or corporate relations. Banks and insurance companies are privately managed because we find by experience that they can be managed more efficiently and economically on the principle of individual responsibility. But, like railroads, they are required to report to a public authority and they are subject to such regulation in the public interest as experience may show to be necessary and public opinion may from time to time approve. The guiding principle in such enterprises is no longer maximum profit to owners but maximum service to the public.

"The time has certainly come to establish the same controlling idea in the anthracite-coal industry. There is not as yet a sufficient basis in knowledge or experience to determine what form of control or regulation will ultimately be most advantageous. What is clear is that in the operation of coal mines, as in the operation of railroads, telephones, water companies, or banks, the public interest must be respected and

served, and that this requirement places limitations on the rights of owners of coal lands, operators, mine workers, carriers, and dealers. The commission believes that the principle of individual and corporate responsibility should be maintained as most likely to insure economical and efficient management of the industry, and that the public interest may be adequately safeguarded by the creation of a governmental authority with power to require financial and operating reports, to prescribe uniform methods of cost accounting, and to determine the conditions on which coal may be shipped in interstate commerce.

. . . . . .

"If, as the commission believes, the mining of coal is clothed with a public interest, then both sides must—peaceably and voluntarily if they will, and under compulsion if they will not—deal with each other in the light of the general welfare of the American people; and while the commission believes there is ample authority to punish a conspiracy of either operators or miners, or both, directed against the general welfare of the people, if there be not such legal authority, it will be recommended for enactment, in the commission's final report."

In its final report, of September 22, 1923, the commission says (Senate Doc. 195, part 1, 68th Congress, second session, p. 259):

"COAL MINING AN INDISPENSABLE PUBLIC SERVICE.

"Food and water alone outrank coal among the necessaries of life. An uninterrupted supply of these three is a requirement of urban life as we know it to-day. Though anthracite ministers to health and comfort in several million homes, bituminous coal is the real foundation of that great industrial and transportation structure which enables more than a hundred million people to live in America and be so well supplied with all those things that are necessary for their health, comfort, and convenience. Bituminous coal also furnishes domestic fuel for half of the homes of the land. Therefore the mining of coal in twenty-nine states, its interstate transportation, and its country-wide distribution together make up a service indispensable to the general public. Shut down the coal mines and the whole country would soon be not only cold but idle and hungry."

And at page 262 *id.* it says:

"The public-welfare element in coal, then, is seen in the dependence of public health and safety on an unfailing supply of fuel, in the close connection between the prosperity of most industries and the uninterrupted operation of the coal mines, and in the obvious fact that without coal the great network of railroads which binds together this great country would be an idle, useless thing. It happens, too, that the railroads and the public utilities, themselves so clearly obligated to render whatever public service is demanded of them that the constitutionality of their public regulation is unquestioned, are of all industries most dependent upon coal. Coal makes up over 35 per cent of the operating cost at the gas plant, and over 25 per cent at the electric-power station, and in the operating expenses of a railroad the cost of coal is the largest single item, next to labor. A failure of the gas and electric plants of a great city to function would result in a public catastrophe of almost inconceivable extent. This is one of the reasons why these utilities have been put under public control, and the practical logic that half a century ago clothed with a public interest the steam locomotive and in later years the electric-power station must recognize a large element of public service in the coal mine that furnishes the necessary energy to both locomotive and power plant. It is this indispensable service which the coal mine performs that gives the large social value both to the property and to its product, and in turn this social value in effect grants to the public an interest in that use and creates a compelling reason for public control.

"The commission is passing here upon an economic fact and not upon the law."

President Coolidge, in his annual message to congress, December 6, 1923, uses this significant language:

"The supply of coal must be constant. In case of its prospective interruption, the President should have authority to appoint a commission empowered to deal with whatever emergency situation might arise, to aid conciliation and voluntary arbitration, to adjust any existing or threatened controversy between the employer and the employee when collective bargaining fails, and by controlling distribution to prevent profit-

cering in this vital necessity. This legislation is exceedingly urgent, and essential to the exercise of national authority for the protection of the people. Those who undertake the responsibility of management or employment in this industry do so with the full knowledge that the public interest is paramount, and that to fail through any motive of selfishness in its service is such a betrayal of duty as warrants uncompromising action by the government."

Reference to these reports is made in order to show the public interest in the business of the mining of coal at the present time. This public interest existed in Kansas in 1919 before the passage of the Industrial Court act.

Conceding, for the purpose of this discussion, that the public interest in the mining of coal is not so great as to permit the state to fix the wages or hours of miners or the price at which coal may be sold to consumers, yet it certainly has such a public interest that it may insure the public safety and see that coal is furnished to the people of the state.

The legislature of Kansas has declared the mining of coal to be affected with a public interest, and the Supreme Court of the state has approved the validity of this statute. This is conclusive and binding on this Court, unless section 19 is clearly arbitrary, unreasonable, and has no relation to the purpose of the act.

In July, 1925, there was a threat of a strike by the workers at all the coal mines in Great Britain. The government appointed a court of inquiry upon July 14, which filed its report July 28. In August, parliament authorized the payment of a subsidy, for the purpose of maintaining the wages of the miners, to be in effect from August 1, 1925, to April 30, 1926, inclusive. The government appointed a commission to investigate and report upon the conditions of the industry, and the means of improving such conditions. The subsidy, as paid, amounted to about twenty-three million pounds. The commission

having reported, and, among other things, recommended against the continuance of the subsidy, the latter was not extended.

A summary of the report of the commission appears in Law and Labor, vol. 8, No. 5, New York, May, 1926, pp. 127-131. We give two quotations from the report, which appear in that summary.

> "1. *Ownership of the Mineral.* The error which was made in times past, in allowing the ownership of the coal to fall into private hands, should be retrieved. The mineral should be acquired by the state—by purchase where it has a market value, by a declaration of state ownership in the case of unproved coal or coal at deep levels, which has now no market value. The coal of existing mines which are likely soon to cease working, and coal which is not now worked and is not likely to be developed in the future, should be excluded from the purchase. Safeguards should be adopted against excessive compensation claims. A coal commission should be appointed, under the authority of the Secretary for Mines, to acquire and administer the mineral property." (p. 127 *id.*)

In the conclusion the report says:

> "The way to prosperity for the mining industry lies along three chief lines of advance; through greater application of science to the winning and using of coal, through larger units of production and distribution, through fuller partnership between employers and employed. In all three respects progress must come mainly from within the industry. The state can help materially—by substantial payments in aid of research; by removing obstacles to amalgamation under existing leases; as owner of the minerals by determining the conditions of new leases; by legislation for the establishment of pit committees and of profit-sharing, and in other ways." (p. 131 *id.*)

See:

Article on "The Crisis in the English Coal Mining Industry," *Monthly Labor Review* for September, 1925, vol. 21, No. 3, p. 179, published by the United States Department of Labor, Bureau of Labor Statistics.

"The Report of the English Coal Commission," *id.*, for May, 1926, vol. 22, No. 5, pp. 52, 56, 57.

Article entitled, "Mining Royalties and the Coal Problem," by Reginald Craddock, "Nineteenth Century and After," No. DXCV, pp. 335, 342, 343, September, 1926.

The commission estimated it would cost about one hundred million pounds for the government to buy the coal rights.

The discontinuance of the subsidy and the failure to arrive at an agreement between the government and the representatives of the coal miners led to the British general strike of May 4 to 12, 1926, which was called in sympathy with the coal miners who, at or about the same time, went on strike. This general strike stopped the conduct of many industries, inflicted enormous financial losses upon the nation, and business has not yet recovered from the disruption caused by it. The coal miners went on strike, and are still out. Great Britain is importing its coal. The British coal miners' strike is a national disaster. Some of its effects are outlined in articles in the London *Statist*, from which quotations are made in vol. 90, No. 1, p. 22, September 18, 1926, *The Literary Digest*.

This court held, in *Jones v. City of Portland*, 245 U. S. 217, 38 S. Ct. 112, that an act of the legislature of Maine, permitting a city or town to establish and maintain within its limits a permanent wood, coal and fuel yard for the purpose of selling at cost wood, coal and fuel to its inhabitants, and giving authority to the city of Portland to levy a tax to pay the expenses of the establishment of such a yard, was not unconstitutional. This court said:

> "The attitude of this court towards state legislation purporting to be passed in the public interest, and so declared to be by the decision of the Court of last resort of the state passing the act, has often been declared. While the ultimate authority to determine the validity of legislation under the Fourteenth Amendment is vested in this court, local conditions are of such varying character that what is or is not a public use in a particular state is manifestly a matter respecting which local authority, legislature and judicial, has peculiar facilities for se-

curing accurate information. In that view the judgment of the highest Court of the state upon what should be deemed a public use in a particular state is entitled to the highest respect. (*Hairston v. Danville & Western Ry. Co.*, 209 U. S. 598, 607, 28 S. Ct. 331, 52 L. Ed. 637, 13 Ann. Cas. 1008.) In *Union Lime Co. v. Chicago & N. W. Ry. Co.*, 233 U. S. 211, 34, S. Ct. 522, 58 L. Ed. 924, this Court declared that a decision of the highest Court of the state declaring a use to be public in its nature would be accepted unless clearly not well founded." (Citing cases.)

In the case of *In re Municipal Fuel Plants*, 182 Mass. 605, 66 N. E. 25, the Supreme Court of Massachusetts, in answer to questions submitted by the legislature, held that where it was impossible to secure an adequate supply of fuel through private yards, a municipal fuel yard might be established by the city, for the reason that agencies of government might be able to obtain fuel when citizens generally could not. The Court said that it was of the opinion that the government might constitute itself an agent for the relief of the community and that money expended for the purpose would be expended for the public use. The Court answered in the affirmative the question whether a city or town might be authorized under proper legislation to sell fuel under certain limitations.

In the case of *State v. Barrett*, 172 Ind. 169, 87 N. E. 7, 11, the Supreme Court of Indiana decided that the mining of coal was affected with a public interest, using the following language:

"It may very properly be said that mining coal is a matter in which the public has a twofold and vital interest; one the production of a highly necessary commodity, and the other the preservation of health, life, and limb. That it is a private enterprise is immaterial. It is also 'affected with the public interests.' 'Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. For our purposes, we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. For us, the question is one of power,

not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void because in excess of the legislative power of the state; but, if it could, we must presume that it did. Of the propriety of legislative interference within the scope of the legislative power, the legislature is the exclusive judge.' (*Munn v. Illinois*, supra.)"

In the case of *People v. United Mine Workers of America*, 70 Colo. 269, 201 Pac. 54, 56, the Supreme Court of Colorado decided that coal mining was affected with a public interest. The court said:

"Then, too, a business by circumstance and in its nature may raise from a private to a public concern (*German, etc., Co. v. Kansas*, 233 U. S. 411, 34 S. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189), and since the decision of the Morgan case (1889) the rapid development of the relations of the coal miners, the coal operators and the public have produced a situation very different from that which then existed. Because of these considerations we do not think that the Morgan case controls this one. However, if the statute in question is not constitutional the dismissal of the bill was right, and must be affirmed.

"Unless coal mining may be said to be affected with a public interest, its regulation by statute to the extent attempted by said chapter is unconstitutional. See the cases cited below. The words 'affected with a public interest' were no doubt used by the general assembly to keep the statute within constitutional limits. It becomes necessary, then, not only in order to construe the statute, but to decide whether it is constitutional, to determine whether coal mining is so affected, and it seems self-evident that it is. We must take judicial notice of what has taken place in this and other states, and that the coal industry is vitally related not only to all other industries, but to the health and even the life of the people. Food, shelter, and heat, before all others, are the great necessities of life, and, in modern life, heat means coal.

"In 1902 the great anthracite coal strike threatened the social stability of several of the great states, and recently, in the neighboring state of Kansas, under the maxim '*Salus populi lex suprema est*,' the governor seized the coal mines, when a strike had stopped the production of coal, and operated them with volunteers until the emergency had passed. Other instances

might be cited. Can it be said that a business with such possible consequences is not affected with a public interest? The answer must be: No." (Citing cases.)

Before the passage of the Kansas Industrial Court Act, and in fact one of the principal reasons for its enactment, there were a number of strikes in the Kansas coal fields. At the beginning of winter in 1919 there was an entire cessation in the mining of coal in that part of the state where the principal mines are located. The shortage of coal throughout the state became so general and the public interest in obtaining fuel was so widespread, that the governor issued a proclamation calling for volunteers to dig coal in the mines in the state. He also called out the state militia to protect those who engaged in coal mining.

The public also has an interest in the prevention of strikes, especially those in the coal-mining industry. The interest of the public in the prevention of strikes is well stated in the case of *Moore Drop Forging Co. v. Fisher*, 239 Mass. 434, 132 N. E. 169, 170. In that case the Supreme Court of Massachusetts said:

"The public has a just interest in the causes of strikes and in placing responsibility and blame for their instigation, prosecution and continuance. The disorder and violence which frequently accompany strikes are matters of common knowledge and often have been adverted to in decisions. (*Plant v. Woods*, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St Rep. 300; *Nute v. Boston & Maine Railroad*, 214 Mass. 184, 100 N. E. 1099; *Folsom Engraving Co. v. McNeil*, 235 Mass. 269, 278, 126 N. E. 479.) The economic waste and immediate financial loss both to employers and employees arising from strikes are too well known to require discussion. Where a strike exists involving more than twenty-five employees, the public concern in the matter is sufficient to justify an impartial investigation by an unbiased board of public officers within the bounds set forth in the statute. Legislation such as is here assailed is authorized by the general-welfare clause of chapter 1, section 1, article 4, part 2, of our Constitution. It has direct con-

nection with the public safety, health and welfare, the recognized foundations for the exercise of the police power. It is within the class of statutes upheld in many cases reviewed in *Holcombe v. Creamer*, 231 Mass. 99, 120 N. E. 354, and is supported by the principle of that decision which need not be here further amplified."

In the case of *State v. Howat*, 109 Kan. 376, 198 Pac. 286, 25 A. L. R. 1210, the Supreme Court of Kansas discussed the question of public interest in the following language:

> "The legislature was of the opinion the industries specified in section 3 of the act of 1920 are affected with a public interest, and so declared. The declaration did not make them so. Whether they are or not depends on their relation to public interest. Without presenting the facts of which the court takes judicial knowledge concerning the peculiar relation the product of the Kansas coal mines bears to the state's fuel supply, and without discussing further the peculiar conditions under which production is accomplished, the Court concludes the business of producing coal bears an intimate relation to the public peace, good order, health and welfare; that such business is affected with a public interest; and that such business may be regulated, to the end that reasonable continuity and efficiency of production may be maintained."

It was out of the legislation of Kansas that the *German Alliance Insurance Company v. Kansas*, 233 U. S. 389, arose for decision in 1914. In that case also some of the most learned counsel in America argued against the validity of the legislative enactment regulating fire-insurance rates, and a particular contention was (p. 401) that "a general public interest is not equivalent to a public use." It was pointed out in the opinion of this Court that—

> "The basic contention is that the business of insurance is a natural right, receiving no privilege from the state, is voluntarily entered into, cannot be compelled, nor can any of its exercises be compelled."

That is the contention of point 1 in the brief for Dorchy, that "the business of mining coal is not clothed with a public interest."

The Supreme Court sustained the act of the Kansas legislature regulating the rates of insurance companies and laid down propositions which are absolutely controlling in the case at bar. This Court said (p. 407):

> "The basis of the ready concession of the power of regulation is of the public interest. This is not denied, but its application to insurance is so far denied as not to extend to the fixing of rates. It is said, the state has no power to fix the rates charged to the public by either corporations or individuals engaged in a private business."

"Engaged in a private business" is the test applied in this case. Are mine owners and miners engaged in a private business?

Referring to legislation about the validity of which there had been many pangs and fears, but which had been sustained, this Court said (p. 409):

> "Against that conservatism of the mind, which puts to question every new act of regulating legislation and regards the legislation invalid or dangerous until it has become familiar, government—state and national—has pressed on in the general welfare; and our reports are full of cases where in instance after instance the exercise of regulation was resisted and yet sustained against attacks asserted to be justified by the Constitution of the United States. The dread of the moment having passed, no one is now heard to say that rights were restrained or their constitutional guaranties impaired."

That states what we contend for here, for while the mining of coal may have been a private business in this country once, and not affected by public interest, that has ceased to be so through the development of social, manufacturing and living conditions in this country, and particularly because of the improvement in the facilities of transportation, which have enabled the coal merchant practically to do business from the railway car which he formerly conducted at great cost from a large coal yard stored with fuel. Mining in this country now is done almost directly from pit to furnace.

The great coal yards of the large city have disappeared. An unusual storm which delays traffic for two or three days imperils the coal supply of the cities. That is a matter of common knowledge; there is not a winter in which the public do not read in the newspapers of threatened coal famines. This change of conditions has made the coal mine, while still a private property, a property affected with a public interest as much as transportation is.

In a very able discussion of the cases on police power, in *Brown v. Feldman*, 269 Fed. 306, 318, the District Court mentioned that "the effort has been to apply a sort of 'rule of reason' to eternally changing facts." Then it added:

> "Having examined the reason for these laws to the best of our ability, we hold it shown that the emergency existed, and that the resultant evil threatened to spread; that the legislative remedy is of a kind long known to the law, though not hitherto used in America; that the business affected is one capable of 'superinducing the right of public regulation'; that the reason assignable for such regulation as embodied in the statutes challenged at bar is the kind of reason justifying this kind of statutes, and, it being sufficient in kind, we are not, and as a court cannot be, concerned with its sufficiency in degree."

In the foregoing case it appeared that the welfare of half a million people was concerned, in respect to housing.

In another case, *Gottlieb v. Matckin*, 191 N. Y. S. 777, it was held that the uninterrupted delivery of milk to the people in the state of New York was vital to the general welfare, and that any organized effort to interfere with the delivery was an act of hostility to the public weal and called for the exercise of the full authority of the state. Said the court:

> "Whatever may be the right or wrong of the present wage controversy, the welfare of this entire community cannot be made subservient thereto."

The question is, Has coal mining risen, in the language of this court, "from private to be a public concern and be subject, in consequence, to governmental regulation"? That will be answered in the affirmative by a review of the facts. Those facts justify the action of the legislature "for the general welfare" which, as this court said in language before quoted, is "in the first instance a matter of legislative judgment and a judicial review of such judgment is limited."

That is to say, it is for the legislature of Kansas to determine what is required for its own order, peace and safety, and its determination upon the facts will not be judicially reviewed except in limited instances.

In addition to the remarkable recital in the decisions of the Supreme Court of Kansas of conditions giving to the people an interest in the operation of the mines, attention might be called to the fact of common knowledge that in December, 1917, and January, 1918, the United States Fuel Administration, which was established as an aid to carrying on the war, took steps toward the reduction of the consumption of fuel, and finally prohibited the heating of any business or professional offices on Mondays from January 21 to March 25, inclusive, which were commonly called heatless Mondays. Under that order great office buildings in the cities and great manufacturing establishments were closed. This need of conservation of fuel was due in part to conditions such as existed in Kansas when the legislation in question was enacted. In 1917 and 1918, as the Supreme Court of Kansas has said, the fate of the man who had gone overseas depended on "patching up strikes at home," there having been between April, 1917, and November, 1918, more than 6,000 strikes in the United States.

The recital of the facts contained in the decisions of the Supreme

Court of Kansas in the foregoing citations show that the business of coal mining is clothed with a public interest, at least to the extent that the state may regulate it to prevent coercive and malicious stoppage of the operation of any mine or mines.

The British coal strike, which has seriously crippled the industries of Great Britain, illustrates clearly the extent to which the welfare of a nation depends upon the coal industry.

Growing out of that strike was the general strike in Great Britain of May 4 to 12, 1926, which stopped the operation of other essential industries, and the business of that country has not yet recovered from the disastrous blow. The industries of that country could not now operate if they were not supplied by foreign coal; they are and will be seriously crippled until the coal strike is over.

## IX.

### The Public Injury by Stopping the Operation of a Coal Mine Through a Strike is Such That a Strike May be Prohibited.

The lessening or stoppage of coal supply is a blow to business, industry, transportation and the administration of public affairs. It causes domestic discomfort, hardships and sickness, which may result in deaths. The blow in any case is serious and can easily amount to a calamity to the public. The consequent discomforts and sufferings amply justify the state in prohibiting a strike that will interrupt or stop the mining of coal. And this is the case although the mining of coal should not be considered as "affected with a public interest" in a constitutional sense. Included in this statement is the point that the action of the state is not without some foundation in reason; that is, it is not arbitrary. It is within the clear duty of the state to prevent the evils mentioned.

## X.

**There is no Arbitrary or Unreasonable Discrimination in the Industrial Court Act. The Classification is Valid Under the Fourteenth Amendment.**

Coal mining is a basic industry. No other fuel can be obtained to supply the place of coal. It is essential for domestic uses, for heating, manufacturing, and the operation of public utilities. There are special reasons for the intervention of the state, to prevent a deprivation of the supply of coal, which justified the statute in question. That a state may take into account special conditions and classify thereon is established by the following decisions of this Court. We indicate the nature of each case.

A statute which allowed more peremptory challenges in large cities than elsewhere.

*Hayes v. Missouri*, 120 U. S. 68, 72, 7 S. Ct. 350.

An ordinance which prohibited washing and ironing in public laundries and washhouses within definite limits between certain hours at night.

*Barbier v. Connolly*, 113 U. S. 27, 30, 31, 28 L. Ed. 923.

A statute which prohibited a junk dealer from buying certain metal material used or belonging to a railroad, telephone, telegraph, gas, or electric light company, without ascertaining by diligent inquiry if the person offering it has a right to sell.

*Rosenthal v. New York*, 226 U. S. 260, 33 S. Ct. 27, 30.

A statute which prohibited combinations in restraint of trade among manufacturers and vendors of articles, but not among purchasers or sellers of services.

*International Harvester Company v. Missouri*, 234 U. S. 199, 215, 34 S. Ct. 859.

A statute which provided for the regulation of fire insurance rates.

*German Alliance Insurance Company v. Kansas*, 233 U. S. 389, 418, 34 S. Ct. 612.

A statute restricting the hours of labor of women in hotels, but excepting railroad restaurants or eating houses upon railroad rights of way, operating under contract with the railroad company.

*Dominion Hotel Company v. Arizona*, 249 U. S. 265, 268, 269, 39 S. Ct. 273.

A statute requiring that negotiable instruments taken in payment for a patented article should show on their face what they were given for, but excepting merchants and dealers.

*Ozan Lumber Company v. Union County National Bank*, 207 U. S. 251, 52 L. Ed. 195.

An ordinance grading license fees upon theaters according to the prices asked for the front or highest-priced seats, other than boxes.

*Metropolis Theater Company v. Chicago*, 228 U. S. 361, 33 S. Ct. 441.

A statute punishing the selling of goods at a lower price in one place than another, for the purpose of destroying the competition of any regularly established dealer therein, or to prevent competition of any person who in good faith intends to become such a dealer.

*Central Lumber Company v. South Dakota*, 226 U. S. 157, 33 S. Ct. 66.

A statute making proof of the setting out of a fire in the operation of a railroad *prima facie* evidence of negligence.

*A. T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 106, 19 S. Ct. 909.

A statute forbidding combinations between fire insurance companies in regard to rates and to commissions allowed agents.

*Carroll v. Greenwich Insurance Company*, 199 U. S. 400, 34 S. Ct. 612, 620.

A statute allowing an attorney's fee to certain successful plaintiffs, but not to successful defendants.

*Missouri-Kansas-Texas R. R. Co. v. Cade*, 233 U. S. 642, 59 L. Ed. 1135.

An ordinance prohibiting the keeping of billiard or pool tables for hire, or public use, but permitting hotel keepers to maintain a billiard or pool room in which their guests may play.

*Murphy v. People of the State of California*, 225 U. S. 623, 56 L. Ed. 1229.

An ordinance prohibiting advertising upon trucks or vans, but permitting ordinary business wagons to display business notices.

*Fifth Avenue Coach Co. v. New York*, 221 U. S. 467, 31 S. Ct. 709.

An ordinance imposing a license tax upon the operation of laundries, but excepting steam laundries and women engaged in the laundry business where not more than two were employed.

*Quong Wing v. Kirkendall*, 223 U. S. 59, 32 S. Ct. 192.

The classification in this act is as old as government itself. The necessity of fuel in order to preserve life does not admit of argument. History discloses that the lack of warmth and other necessities has often changed ordinary communities into mobs, seeking to gain by force those things which the government has not provided for them through the ordinary channels of commerce. It is not an arbitrary classification for the legislature of the state to recognize these facts and secure fuel for its inhabitants and prevent the recurrences of the disturbance of peace of the state.

Where an evil is experienced in a particular branch of business the statute or a regulation may be confined thereto.

*Carroll v. Greenwich Insurance Co.*, 199 U. S. 404, 26 S. Ct. 66.

The judicial view of such a question is limited.

*German Alliance Insurance Company v. Lewis*, 233 U. S. 389, 34 S. Ct. 612, 620.

This law was passed in order to protect the same rights of life, liberty and property of its citizens that the plaintiff in error now claims are infringed in his case. Upon the state and the government rests the obligation to create the even balance between individuals and business and commerce and labor, upon which the smooth interrelation of our modern complex society depends. Upon the courts devolve the duty to maintain. The employer has rights of liberty, property and contract; the laborer has those same rights; and still further the general public has likewise the same. The people, "to insure the full enjoyment of our rights as American citizens" (preamble, Constitution of the state of Kansas), have placed in the legislature the power, and with it the responsibility, to pass such laws and to lay down such rules of action as will preserve that balance, that peace and harmony which are necessary to stable government, and to prevent the excesses and abuse of liberty by some at the expense and deprivation of the rights and liberties of others. With that responsibility upon them, how is the law before us arbitrary or its classification unreasonable? People were freezing, the supply of fuel had ceased, the industry was tied up by illegal strikes, the mines had been taken over by the state, the troops had been called out, volunteers had come from the colleges and business life of the state to go into the mines and dig coal in order to supply the needs of the freezing public—and how, except by law, could a recurrence of such a situation be prevented?

It seems plain to the defendant in error that the state of facts such as was here presented to the legislature—facts which were known throughout every state in the Union—are more than sufficient to sustain the act. It can hardly be said to be an improper use of the power to assume that experience has taught that a situation, having happened in the past, may likewise again happen in the

future, unless a remedy is applied. It is sufficient in itself to justify the legislature in having sought and applied the remedy, and the results in this state have more than justified its wisdom.

## XI.

## The Statute Is Not Arbitrary.

Independent of the Kansas Industrial Court act, and under numerous judicial decisions, this was an illegal strike. Dorchy, who induced it, caused the employees of the Mackie Fuel Company, who had no dispute with their employer, to do an illegal act. This being true, a statute which makes it a crime is not so arbitrary or unreasonable as to justify this Court in holding it beyond the police power of the state to enact.

It has been repeatedly decided by this Court that the state has an interest in the working conditions and hours of labor in mills, manufacturing establishments and dangerous industries. It has been held by this Court that the government and state may enjoin strikes after they have been called, when dangerous to the public welfare and a disturbance of the public peace. The power of the government to prevent such strikes has been recognized in *In re Debs*, 158 U. S. 564, 15 S. Ct. 900; *United States v. Railway Employees Dept. A. F. L.*, 283 Fed. 479, 286 Fed. 228 (shop crafts' strike, 1922).

That states have the power to prevent strikes which interfere with the public safety, the public welfare and the public peace of the community must be conceded. This identical strike in the mine of the Mackie Fuel Company was one of the two strikes the subject of the controversy in *State v. Howat*, 109 Kan. 376, 198 Pac. 286, 25 A. L. R. 1210. The Supreme Court of Kansas discussed the question as to whether the injunction was invalid as an attempt to enjoin a crime. The Court said:

"The Court found that all the perils to the public welfare which accompanied the coal strike of the winter of 1919-'20 would again be incurred. That strike caused industry to stop, caused commerce to be demoralized, caused food supplies to be reduced and cut off, caused schools to close, caused suffering in homes, and if the defendants had been permitted to have their way, would have caused the sick to languish and die in unwarmed hospital beds in the dead of winter. If those consequences were produced in a single village by blocking the highway over which necessaries of life were brought in, anybody would say blocking the highway was a public nuisance, and a court of equity could open the road. Multiplicity and magnitude of threatened disaster do not detract from authority of a court of equity over a few determined individuals who propose to wreak the disaster. Ability of the defendants to paralyze the normal activities of a whole commonwealth did not free them from amenability to injunction. The District Court was warranted in interfering on principles identical with those applied in abatement of public nuisances, and the Court was not shorn of power because the defendants, if they persisted, would incidentally be guilty of crime."

The Supreme Court of Kansas sustained the district court in punishing Howat, and this same plaintiff in error, Dorchy, for violating the injunction that it granted.

The case of *State v. Howat*, 107 Kan. 423, was also decided against the same defendants by that court. Both cases were brought to this Court and decided in the case of *Howat v. Kansas*, 258 U. S. 181, 42 S. Ct. 277. This Court found that no constitutional right of these defendants was invaded by what was done by the courts of Kansas. If those courts had a right to enjoin the calling of a strike and possessed the power to punish for contempt the violation of the injunction order, upon what grounds can it be now claimed that the same act which was enjoined there cannot also be made a crime by the Industrial Court Act?

These acts had been enjoined and injunction sustained by the Supreme Court of Kansas.

The same act may give rise to a civil action and a criminal prosecution. This was decided by this court in the Debs case, *supra*. This Court there said:

> "The law is full of instances in which the same act may give rise to a civil action and a criminal prosecution. An assault with intent to kill may be punished criminally, under an indictment therefor, or will support a civil action for damages; and the same is true of all other offenses which cause injury to person or property. In such cases the jurisdiction of the civil court is invoked, not to enforce the criminal law and punish the wrongdoer, but to compensate the injured party for the damages which he or his property has suffered; and it is no defense to the civil action that the same act by the defendant exposes him also to indictment and punishment in a court of criminal jurisdiction. So here the acts of the defendants may or may not have been violations of the criminal law. If they were, that matter is for inquiry in other proceedings. The complaint made against them in this is of disobedience to an order of a civil court, made for the protection of property and the security of rights. If any criminal prosecution be brought against them for the criminal offenses alleged in the bill of complaint of derailing and wrecking engines and trains, assaulting and disabling employees of the railroad companies, it will be no defense to such prosecution that they disobeyed the orders of injunction served upon them, and have been punished for such disobedience."

Carl Mishmash at the time of the strike in question was not an employee of the Mackie Fuel Company. There was no question of raising wages or any dispute as to wages between the members of the union then working at Mine H and the Mackie Fuel Company. The defendant in the case below induced the men working at Mine H to strike, in violation of their contracts of employment, in order to prevent the Fuel Company from a resort to the courts to settle the controversy between it and its ex-employee, Mishmash. The Mackie Fuel Company insisted there had been no arbitration or award made under the terms of any contract. Moreover, it had a constitutional right to resort to the courts to determine three things: (1) whether

or not there had been such an arbitration; (2) if there had, then whether or not there was fraud inherent therein which would vitiate it; (3) if there had not, then whether the company's contention or that of its ex-employee was correct. (Secs. 418, 429, G. S. Kan. 1915.) These questions it had a right to submit to a court under the "due process" and "equal protection" clauses of the Fourteenth Amendment to the Constitution of the United States. Dorchy insists here that a statute which, as applied to him, prevented him from coercing the Fuel Company into giving up the protection of the Federal Constitution, is of itself unconstitutional and void. A statute which makes a crime the commission of that act which has already been declared illegal by judicial decisions cannot be held to be arbitrary or so unreasonable as to violate the Federal Constitution.

## XII.

**The Statute, Not Being Arbitrary, Should Not Be Held Invalid.**

To hold a statute invalid as in violation of the "due process of law" and the "equal protection of the laws" clauses in the Fourteenth Amendment it is not enough that the Court should reach a contrary opinion to that of the legislature on the point whether the statute is useful, desirable or wise. To hold it invalid it is essential that the Court should determine that it is arbitrary; that is, that there is no reason to support it. On questions of economics or public policy where there is some foundation in reason for the statute the Court does not substitute its judgment for that of the legislature.

In the case of *Otis v. Parker*, 187 U. S. 606, 608, 609, 47 L. Ed. 323, 327, the Court held valid a statute of California avoiding all contracts for sales of shares of corporate stock on margin and providing for the recovery of any money paid on such contracts, and, speaking by Mr. Justice Holmes, said:

"It is true, no doubt, that neither a state legislature nor a state Constitution can interfere arbitrarily with private business or transactions, and that the mere fact that an enactment purports to be for the protection of public safety, health, or morals, is not conclusive upon the courts. . . . But general propositions do not carry us far. While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view, as well as for possible peculiar conditions which this Court can know but imperfectly, if at all. Otherwise a Constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held *semper ubique et ab omnibus.*"

We cite cases supporting this proposition and indicate the nature of each case:

A statute was held valid making it a criminal offense for a contractor for a public work to permit or require an employee to perform labor upon that work in excess of eight hours each day.

*Atkins v. Kansas*, 191 U. S. 207, 223, 48 L. Ed. 148, 158.

A statute was held valid under which miners employed for wages were required to be paid upon the basis of screened coal instead of the weight of the coal as originally produced in the mine.

*McLean v. Arkansas*, 211 U. S. 539, 547, 548; 53 L. Ed. 315, 320.

A statute was held valid authorizing compulsory vaccination.

*Jacobson v. Massachusetts*, 197 U. S. 11, 31; 49 L. Ed. 643, 651.

A statute was held valid which prevented the acceptance of benefits as a member in a railroad relief department being used as a defense in an action for damages on account of negligent management in the operation of the railroad.

*Chicago, Burlington & Quincy Ry. Co. v. McGuire*, 219 U. S. 548, 570; 55 L. Ed. 328, 339, 340.

A statute was held valid to regulate fire insurance rates.

*The German Alliance Insurance Co. v. Lewis*, 233 U. S. 389, 413, 414; 58 L. Ed. 1011, 1022, 1023.

A statute was held valid which required steam railway companies to pay the wages of their employees semimonthly.

*Erie Railway Company v. Williams*, 233 U. S. 685, 699; 58 L. Ed. 1155, 1160, 1161.

A statute was held valid which provided for licensing as insurance brokers only residents of a state who had been licensed insurance agents in the state for two years.

*La Tourette v. McMaster*, 248 U. S. 465, 468; 63 L. Ed. 362, 364.

The action of the President was upheld in taking over under statutory authority the operation of telegraph and telephone lines during the war period.

*Dakota Central Telegraph Company v. South Dakota*, 250 U. S. 163, 184; 63 L. Ed. 910, 924.

A statute was held valid which imposed upon employers in certain hazardous employments liability for compensatory damages on account of the injury or death of their employees.

*Arizona Copper Co. v. Hammer*, 250 U. S. 400, 419; 63 L. Ed. 1058, 1066.

The war-time prohibition statute of November 21, 1918, was upheld.

*Hamilton v. Kentucky Distilleries and W. Co.*, 251 U. S. 146, 161, 162, 64 L. Ed. 194, 202.

The legislature of Kansas thought the public welfare would be advanced by prohibiting the calling of a strike under the circumstances stated in sections 19 and 17, chapter 29, Laws of Kansas,

Special Session, 1920. It had before it the experiences of a number of years in the southeastern Kansas mining district, where, under the orders of District No. 14 and its officers, there had been a multitude of frivolous or malicious strikes, by means of which District No. 14 and its officers had throttled the mining industry at their will and caused serious damages to the operators of the mines and to the public. This was followed by the strike of November and December, 1919, which caused hardship and suffering to the people of the state. The legislature was amply justified in taking the view that it was to the public benefit to stop strikes at coal mines in the state, and that any losses that might result thereby to the employees were of much less consequence than the public injury. To say the least, this was not an arbitrary action by the legislature, or without some reasonable foundation, and it was a question proper for legislative determination. Under the decisions, the antistrike provision of the statute should not be held invalid, because the Court might take a different view of the public welfare.

## XIII.

### The Rule Which Permits Strikes Under Some Circumstances is One of Economics and Public Policy and is Not Based on Any Constitutional Provision.

A strike is not, in the intention of the strikers, an abandonment of their jobs. It is a concerted withdrawal from work by the strikers, intended by them to be temporary only, for the purpose of stopping the operation of the industry until the employer shall accede to their demands. They plan to resume their employment when their demands are complied with, and that no other workmen shall be hired in their places. If the strike is peaceful, the strikers use persuasion and influence to induce other workmen not to take their places. They usually picket the plant of the employer.

## THE OLD RULE ON STRIKES.

In England, both as a result of statutes and of the growth of common-law doctrines, the strike was treated as unlawful. Under the common law, as laid down by the courts, it was illegal.

*Rex v. Journeyman Tailors*, 8 Mod. Rep. 11.

*Springhead Spinning Co. v. Riley*, L. R. 6 Eq. 554 (1868).

It was held to be in restraint of trade in a case where no statute was referred to.

*Hornby v. Close*, 2 Q. B. L. R. 153, 158, 169 (1867).

See, also, on the subject—

*Rex v. Mawbey*, 60 T. R. 619, 636.

*Walsby v. Anley*, 3 E. & E. 516, 523.

*Quinn v. Leathem*, (1901) A. C. 495, 526, 541.

*Regina v. Bunn*, 12 Cox C. C. 316.

The rule in England has been changed by statutes, and strikes for many purposes are now permitted.

In Pennsylvania a strike was formerly illegal at common law, but now is permitted for some purposes, by statute.

*Cote v. Murphy*, 159 Pa. St. 420, 425.

In New York strikes were formerly unlawful at common law.

*People v. Melvin*, 2 Wheeler's Criminal Cases 262.

In the case of *People v. Fisher*, 14 Wend. 9, 13, 20, decided in 1835 by the Supreme Court of Judicature of New York, a combination of journeymen shoemakers was charged to fix a price for making coarse boots, and that if a journeyman shoemaker should make such boots for compensation below the rate established, he should pay a penalty of $10; and if any master shoemaker employed a journeyman who had violated the rules, they would refuse to work for him and would quit his employment; and it was charged that the members of the

combination carried it into effect by leaving the employment of a master workman in whose services a journeyman had violated their rules, and thus compelled the master shoemaker to discharge such journeyman from his employ. There was a statute of New York on conspiracy which made it a misdemeanor, among other things, "to commit any act injurious to the public health, to public morals, or to trade or commerce." The defendants were indicted for conspiracy alleged in violation of this statute. The indictment was sustained. In its opinion the court said that at common law "journeymen may each, singly, refuse to work unless they receive an advance of wages, but if they do so by preconcert or association they may be punished for a conspiracy." The court held that the combination was injurious to trade within the meaning of the statute. "If the defendants cannot make coarse boots for less than one dollar per pair, let them refuse to do so; but let them not, directly or indirectly, undertake to say that others shall not do the work for a less price. It may be that Pennock, from greater industry or greater skill, made more profit at making boots at seventy-five cents per pair than the defendants at a dollar. He had a right to work for what he pleased. His employer had a right to employ him for such price as they could agree upon. The interference of the defendants was unlawful; its tendency was not only to individual oppression, but to public inconvenience and embarrassment."

## THE NEW RULE ON STRIKES.

There were changes by statute of the law in England on the subject of strikes so as to permit them under some circumstances. In the United States the rule was changed first by judicial decisions, and, after the courts had acted, statutes were passed in some of the states permitting strikes under certain circumstances. The rule as established by the decisions in this country now is, in substance, that strikes called by employees upon disputes concerning wages, hours

and terms or conditions of employment are held justifiable and legal, but strikes for other purposes are held illegal. For these permitted purposes employees are permitted by means of a strike to stop the operation of the employer's industry and thus to coerce their employer into compliance with the employees' demands. This coercive injury of itself is a wrong, and it would be held a legal wrong if the facts were not thought by the court to constitute a justification. The employees are permitted to inflict an injury upon the employer, which would otherwise be a legal wrong, for the purpose of attaining the benefits to the employees above mentioned. This new rule has not been established on constitutional grounds, but upon grounds of economics and public policy. Weighing the injuries against the benefits, it has been thought by the courts to be for the public welfare that these classes of strikes should be permitted, and the bargaining power of the employees thereby increased, although an injury is done to the employer, and oftentimes to third parties. This increased bargaining power is obtained by the ability to inflict or the actual infliction of an intentional injury upon the employer. These, however, are considerations proper for a legislature, and, in the nature of the subject, a legislature has the right and power to come to a different conclusion and to forbid strikes on the ground of the injury to the employer and to the public, and also upon the ground of the serious abuses, disorders and suffering which so often flow from strikes.

In Massachusetts, in 1842, in *Commonwealth v. Hunt*, 4 Metc. 111, the Supreme Judicial Court had before it for consideration an indictment against seven defendants for conspiracy. The first count of the indictment charged a conspiracy *inter alia*, "and, being so assembled, did then and there unjustly and corruptly combine, confederate and agree together, that none of them should thereafter, and that none of them would, work for any master or person what-

soever, in the said art, mystery or occupation, who should employ any workman or journeyman, or other person, in the said art, who was not a member of said club, society or combination, after notice given him to discharge such workman from the employ of such master."

The other counts of the indictment charged that as a result of the conspiracy the defendants caused the discharge of one Jeremiah Horne from his position as a journeyman bootmaker. The defendants having been found guilty on the indictment in municipal court, the case came before the Supreme Judicial Court, which sustained exceptions to the indictment and arrested the judgment. The Court passed upon the question of the validity of the indictment under the criminal law, and did not pass upon the question whether the combination and the acts done under it were protected by any provision of the state or federal Constitution. At one point in the opinion it touched upon the question of economics and public policy in these words:

> "We think, therefore, that associations may be entered into, the object of which is to adopt measures that may have a tendency to impoverish another, that is, to diminish his gains and profits, and yet so far from being criminal or unlawful, the object may be highly meritorious and public spirited." (p. 134, *supra.*)

The view of the Court on one of the points passed upon in *Commonwealth v. Hunt* has not been followed in Massachusetts. It has been there held that a threat of a strike in order to compel the discharge of a person not a member of the defendants' union, for the purpose of compelling such person to become a member of that union, is unlawful.

*Plant v. Woods*, 176 Mass. 492.
*Aberthaw Construction Co. v. Cameron*, 194 Mass. 208.

In 1867, in the case of *Master Stevedores' Association v. Walsh*, 2 Daly 1, in the Court of Common Pleas for the city and county of

New York, an action was brought by the plaintiff, a corporation composed of master stevedores, of which the defendant was a member. It had a by-law "to the effect that there should be no variation from the prices adopted by the association, and that if any member, after an investigation by a committee, should be found guilty of working for less than the prices fixed, he should forfeit to the association 25 per cent of the amount of such bill as fixed, which penalty might be collected in the name of the corporation by due process of law." The complaint charged that the by-law was subscribed to by defendant, that the corporation (plaintiff) had fixed the rate for discharging railroad iron from vessels at 52 cents a ton, and that the defendant had discharged 1,500 tons in violation of this rate; that he was consequently found guilty by the association of a violation by working for less than the recognized price, and incurred a penalty of $125, for the recovery of which the action was brought." The court said:

> "It may, therefore, be laid down as the result of this examination, that it is lawful for any number of journeymen or of master workmen to agree, on the one part, that they will not work below certain rates, or on the other, that they will not pay above certain prices; but that any association or combination for the purpose of compelling journeymen or employers to conform to any rule, regulation or agreement fixing the rate of wages, to which they are not parties, by the imposition of penalties, by agreeing to quit the service of any employer who employs a journeyman below certain rates, unless the journeyman pays the penalty imposed by the combination, or of menaces, threats, or intimidations, violence, or other unlawful means, is a conspiracy for which the parties entering into may be indicted."

The Court said that it would be in the power of the members of the association, by associated effort, to secure what it would not be possible for one of them to accomplish alone, and that the combination was not prejudicial to the interests of the public. It did

not argue that the combination would be sustained on any constitutional ground.

The court sustained the validity of the by-law upon a demurrer to the complaint. There was no strike, actual or threatened, in the case.

Afterwards, by statute, strikes for certain purposes were permitted in New York.

Some of the states have adopted statutes permitting strikes under some circumstances. Among them are New York, New Jersey and Pennsylvania.

New York: Sec. 582, art. 54, Penal Law—Conspiracy. McKinney's Consolidated Law of New York, annotated (1917), p. 220. (Sec. 170, Penal Code of 1881, as amended L. 1882, ch. 384, sec. 1.)

New Jersey: Par. 128, sec. 1, p. 3051, vol. 3, Compiled Laws of New Jersey (1911), subhead 9, "Labor Unions," under the head of "Labor." The foregoing statute was the act of February 14, 1883, P. L. of 1888, p. 36, which statute read:

> "That it shall not be unlawful for any two or more persons to unite, combine or bind themselves by oath, covenant, agreement, alliance or otherwise to persuade, advise, or encourage, by peaceable means, any person or persons, to enter into any combination for or against leaving or entering into the employment of any other person, persons or corporation."

The statute as printed in the Compiled Laws of 1911 follows the original statute, except that the word "other" was omitted next preceding the words "person, persons or corporation," at the end of the section.

In the case of *Frank & Dugan v. Herold*, 63 N. J. Eq. 443, 447, 448, Pitney, vice chancellor, said, referring to this statute:

> "In my judgment the true construction of the act of 1883 is simply that it renders innocent, as against the public, an act which previous to its passage was a misdemeanor and punishable by indictment. It does not take away or in any wise

affect any private rights which may arise out of acts which are legalized by that legislation."

Pennsylvania: Sec. 21244 (1869, May 8, P. L. 1260, sec. 1); sec. 21245 (1872, June 14, P. L. 1175, sec. 1); sec. 21246 (1876, April 20, P. L. 45, sec. 1); sec. 21254 (1891, June 16, P. L. 300, sec. 1). Pennsylvania Statutes, Complete to 1920 (1921, published by the West Publishing Co.).

The opinions in *Commonwealth v. Hunt*, and *Master Stevedores' Association v. Walsh*, supra, were the starting points for many cases holding strikes lawful where they were for the purpose of obtaining higher wages for the employees, shorter hours, or better working conditions. This rule, as it has been developed, is one of law, and not of constitutional right. The reason for it is that it enables the workmen, by combination, to obtain better terms from their employer than if they acted singly, and thereby to improve the condition of the workmen. This rule is one of economics and public policy and not of constitutional right.

## ILLEGAL STRIKES.

The doctrine that strikes under certain circumstances may be lawful had not long been declared before the necessity was forced upon the courts of limiting the occasions in which strikes might be called or enforced. There have been many such cases, some of which we cite:

A strike is illegal for the purpose of redressing a grievance of an individual member of the labor union.

> "The strike in question was a combination for the purpose of making the trades council, composed of delegates from the unions of which the individual defendants are members, the arbiter of all questions between individual employees and their employers. It purports to include questions arising under contracts still in existence between the two. To force the employer to submit to a delegate body of employees his rights under an

existing contract, by a combination for that purpose, is not a justifiable interference with their employer's business. . . . We do not mean to say that a labor union cannot combine to support a committee to take up individual grievances in behalf of the several members. What we now decide to be illegal is a combination that such grievances (that is to say grievances between an individual member of a union and his employer which are not common to the union members as a class), shall be decided by the employees and that decision enforced by a strike on the part of all."

*Reynolds v. Davis*, 198 Mass. 294, 84 N. E. 457; 17 L. R. A., n. s., 162, 170.

"Every man, as I have stated, has a right to leave the service of his employer if he is not satisfied with the wages he gets, but men ought not to combine together and cause at once a strike among all railroad employees, so as to prevent the running of trains, because the injury there is public in its character; it affects the whole country, as it were, and not a particular community or a particular neighborhood, and in several states it is made a public offense."

*King v. Ohio & M. Ry. Co.*, 7 Bissell, 537.

The following have been held to be unlawful:

A combination of third parties to induce employees to quit work in order to obtain higher wages.

*Old Dominion Steamship Company v. McKenna*, 30 Fed. 48.

A combination of persons to induce employees to break their contract of employment or to quit work.

*Employing Printers' Club v. Dr. Blosser Co.*, 122 Ga. 509; 50 S. E. 353, 69 L. R. A. 90, 95, 96; 106 Am. St. Rep. 137.

A combination to induce employees to break their contract of employment.

*Vegelahn v. Guntner*, 167 Mass. 92; 44 N. E. 1077; 35 L. R. A. 722; 57 Am. St. Rep. 443.

*South Wales Miners' Federation v. Glamorgan Coal Co.*, 1905 A. C. 239, 244, 255; 2 A. & E. Ann. Cas. 436.

*Walker v. Cronan*, 107 Mass. 555.

*Thacker Coal & Coke Co. v. Burke*, 59 W. Va. 253; 53 S. E. 161; 5 L. R. A., n. s., 1091; 8 Ann. Cas. 885.

*Thomas v. C. N. O. & T. P.*, 62 Fed. 803, 818.

A strike to compel workmen to break their contract of employment.

*Folsom v. Lewis*, 208 Mass. 336; 94 N. E. 316; 35 L. R. A., n. s., 787.

To break their contract for service at will.

*Thacker Coal & Coke Co. v. Burke*, 59 W. Va. 253; 53 S. E. 161; 5 L. R. A., n. s., 1091; 8 Ann. Cas. 885.

To stop work in violation of a contract of employment.

*Mapstrick v. Ramge*, 9 Neb. 390; 2 N. W. 739.

A combination to induce workmen at will to break their contract not to join a union.

*Hitchman Coal & Coke Co. v. Mitchell*, 212 Fed. 512, 549, 550, 554, 556, 557; 245 U. S. 229; 62 L. Ed. 260.

*Jonas Glass Co. v. Glass Bottle Blowers' Association*, 77 N. J. Eq. 219, 221, 223, 224; 41 L. R. A., n. s., 445; 79 Atl. 262.

To maintain a patrol in order to induce persons not to work for a party.

*Vegelahn v. Guntner*, 167 Mass. 92, 99, 100.

To strike in order to prevent the hauling of cars by one railroad for another.

*Waterhouse v. Comer*, 55 F. 149, 155, 156.

*Toledo, Ann Arbor & North Mich. R. R. v. Penn. Co.*, 54 Fed. 730, 746.

*Lowe v. Lowe*, 54 Fed. 746.

To prevent a railroad hauling Pullman cars.

*U. S. v. Elliott*, 62 Fed. 801.

To compel an employer to abolish piece work.

*Davis Machine Co. v. Robinson*, 41 Misc. 329; 84 N. Y. Sup. 837, 839, 841.

To compel an employer to cease using machinery.

*Hopkins v. Oxley Stave Co.*, 83 Fed. 912; 28 C. C. A. 99.

To threaten to strike in order to prevent a party furnishing materials to be used in the work.

*Burnham v. Dowd*, 217 Mass. 351, 356, 357.

To strike to compel an employer not to do work on a building where work was being done by another union which the strikers' union claimed its members should do.

*Pickett v. Walsh*, 192 Mass. 572; 78 N. E. 753; 6 L. R. A., n. s., 1067; 116 Am. St. Rep. 272.

To strike to compel an employer to hire only union men.

*Folsom v. Lewis*, 208 Mass. 336; 94 N. E. 316; 35 L. R. A., n. s., 787.

*Snow Iron Works v. Chadwick*, 227 Mass. 382, 389; 116 N. E. 801; L. R. A. 1917F. 755.

*State v. Glidden*, 55 Conn. 46; 8 Atl. 890; 3 Am. St. Rep. 23.

*Hite Mfg. Co. v. Murphy*, 78 N. H. 398, 404, 405; 101 Atl. 357.

*Davis Machine Co. v Robinson*, 41 Misc. 329; 84 N. Y. S. 837, 840, 841.

*Schwarcz v. International Ladies' G. W. Union*, 68 Misc. 528; 124 N. Y. S. 968, 970-973.

*O'Brien v. People*, 216 Ill. 354, 370-373; 108 Am. St. Rep. 219; 75 N. E. 108; 3 Ann. Cas. 966.

*Barnes & Co. v. Berry*, 156 F. 72.

*Hitchman Coal & Coke Co. v. Mitchell*, 212 Fed. 512, 549, 550, 554, 556, 557; 245 U. S. 229, 239, 240; 62 L. Ed. 260.

*State v. Stewart*, 59 Vt. 273; 9 Atl. 559; 59 Am. St. Rep. 710.

To request customers of a draying company to withdraw their business from it, under penalty of strikes of the union workmen of such customers, in order to compel the draying company to employ only union labor.

*Auburn Draying Co. v. Wardell*, 227 N. Y. 1; 124 N. E. 97; 6 A. L. R. 901.

To strike to compel employees under threat of discharge to transfer from one labor union to another.

*Housepainters Assoc. v. Feeny*, 13 Pa. Dist. R. 333; 29 Pa. Co. Ct. 524.

To threaten to strike in order to compel an employer to discharge certain employees.

*State v. Donaldson*, 32 N. J. L. 151; 90 Am. Dec. 649.

To threaten to strike in order to cause the discharge of a nonunion workman.

*Lucke v. Clothing Cutters & Trimmers Assembly*, 77 Md. 396, 402, 407.

*Plant v. Woods*, 176 Mass. 492, 505; 57 N. E. 1011; 51 L. R. A. 339; 79 Am. St. Rep. 330.

*Aberthaw Construction Co. v. Cameron*, 194 Mass. 208.

To strike to compel the discharge of an employee because he did not belong to a labor union.

*Ruddy v. United Association*, 79 N. J. L. 467; 75 A. 742.

*People v. Smith*, 10 N. Y. St. 730; 5 N. Y. Crim. 512. Affirmed, 15 N. Y. St. 17; 6 N. Y. Crim. 292.

*State v. Dyer*, 67 Vt. 690; 32 A. 814.

To strike to prevent others from obtaining work.

*Erdman v. Mitchell*, 207 Pa. 79; 26 Atl. 327; 63 L. R. A. 534; 99 Am. St. Rep. 783.

To strike to compel an employer to hire a particular person.

*Commonwealth v. Curren*, 3 Pittsburgh, Pa., p. 143.

To induce an employee to quit his work as organist in a theater in order to compel the employer to employ an orchestra of five to furnish music at the theater in place of the organ.

*Haverhill Strand Theatre v. Gillen*, 229 Mass. 413; 118 N. E. 671; Am. Cas. 1918D, 650; L. R. A. 1918C, 813.

To strike to compel an employer to join a master plumbers' association.

*Coons v. Chrystie*, 24 Misc. 226; 53 N. Y. Supp. 668.

To strike to compel collective bargainings.

*United Shoe Machinery Corporation v. Fitzgerald*, 237 Mass. 537; 130 N. E. 86; 20 A. L. R. 1508.

To induce employees to quit work for the purpose of extorting money from the employer.

*State v. Dalton*, 134 Mo. App. 517, 535, 538; 114 S. W. 132.

To extort money from an employer as a consideration for permitting strikers to return to work who had made a settlement of the controversy. The Court adopted the dissenting opinion of Daniels, Justice, in the Supreme Court, 16 N. Y. Supp. 436, 441.

*People v. Barrondess*, 133 N. Y. 649; 31 N. E. 240, 241.

It is unlawful maliciously to induce another to break his contract with the plaintiff.

*Angle v. Chicago, St. Paul, etc., R. R. Co.*, 151 U. S. 1, 13, 14, 15.

*Tubular Rivet & Stud Co. v. Exeter Boot & Shoe Co.*, 159 Fed. 824, 830; 86 C. C. A. 648.

Persons who caused a master to discharge a servant, by threat of a strike, to compel the servant to pay a debt, were liable to the servant.

*Giblan v. National Amalgamated Laborers' Union*, 2 K. B. 600 (1903).

To strike to compel an employer to pay a fine to a labor union.

*Burke v. Fay*, 128 Mo. App. 690; 107 S. W. 408.

A strike to compel an employer to coerce his employees, under threat of discharge, to pay a fine to a labor union for reinstatement.

*Harvey v. Chapman*, 226 Mass. 191; 115 N. E. 304; L. R. A. 1917E, 389.

To strike to compel an employer to pay a labor union a fine assessed by it against an employee, a member of the union.

*Hillenbrand v. Trades Council*, 14 Ohio Dec. N. P. 628.—A learned opinion.

It is unlawful to pay money to employees to induce them to quit work in order to compel the employer to recognize a labor union.

*Tunstall v. Stearns Coal Co.*, 192 Fed. 808; C. C. A. 6th Circt.

A conspiracy was held unlawful to persuade employees to join a union in violation of their agreement with their employer and to continue in the employer's service, for the purpose of ultimately coercing the employer, through a strike or a threat of one, to enter into a closed-shop agreement.

*Hitchman Coal & Coke Co. v. Mitchell*, 212 Fed. 512, 549, 550, 554-557; 245 U. S. 229.

The fact that the employment is at the will of the parties, respectively, does not make it one at the will of others.

*Truax v. Raich*, 239 U. S. 33, 38; 60 L. Ed. 131.

The decisions which limit the privilege of striking do not permit it to be lawfully exercised except to improve the bargaining power of the employees as to wages, hours and working conditions, and, by the weight of authority, only by an immediate action by employees against the employer, and not against one not a party to the original controversy. The method of these decisions, and the reasoning of

many of them, show the courts were dealing with the problem of bounding a privilege and not of defining a constitutional right.

## *IN RE* LENNON.

In the case of *In re Lennon*, 166 U. S. 548, 557, a bill was filed by the Toledo, Ann Arbor and North Michigan Railway Company in the Circuit Court of the United States for the Northern District of Ohio. It alleged that it was the duty of certain other railroad companies, including the Michigan Central Railroad Company, to receive, forward and deliver freight cars between it and complainant in the ordinary transaction of business, without any discrimination; that the defendant companies and their employees had threatened they would refuse to receive from complainant cars billed over its road for transportation, by complainant, to their destination, for the reason that the complainant had employed as locomotive engineers in its service men who were not members of the Brotherhood of Locomotive Engineers, and that the locomotive engineers in the employ of the defendant companies had refused to handle cars to be interchanged with the complainant's road, although they continued to afford other railroad companies full and free facilities for the interchange of traffic, while refusing to transact such business with the complainant.

Upon the application of the complainant the Circuit Court issued an injunction against the defendants and their employees, enjoining them from refusing to afford the complainant the same facilities for an interchange of interstate business between the companies as were enjoyed by other railway companies, and from refusing to receive from the complainant cars billed from points in one state to points in another state, which might be offered to the defendant companies by the complainant.

The injunction was served upon the Lake Shore and Michigan Southern Railway Company, one of the defendants, one of whose

employees was the appellant, James Lennon, a locomotive engineer, who received notice of the injunction.

While on the run with his train, Lennon refused to receive and haul a car tendered by the complainant company. He was then handed a printed copy of the injunction order, and he stated he had seen it and understood it. At the time he refused to handle the car he stated that he quit. Afterwards he received a telegram from an officer of the Brotherhood of Locomotive Engineers, saying he could handle Ann Arbor cars, and he then received the Ann Arbor car in question and proceeded with his train upon the remainder of his run. His refusal to handle the car was during a period of about five hours.

He was punished by the Circuit Court for contempt for refusing to obey the injunction. The judgment was upheld in the Circuit Court of Appeals and in this court. It is said in the opinion of this Court, 166 U. S. 557:

> "It is sufficient, in the present case, to observe that the court found, upon the testimony, that the petitioner did not quit in good faith in the morning, but intended to continue in the company's service, and that his conduct was a trick and device to avoid obeying the order of the court.
>
> "The finding of the court in this particular is not open to review, and hence the question whether the court has power to compel the performance of a personal contract for service does not arise. It was a question for the court to determine whether the petitioner's action in delaying the train five hours at Alexis was taken in pursuance of a determination to abandon the service of the company, or for the purpose of disobeying the lawful injunction of the court. The finding of the court was against the petitioner upon that point.
>
> "There was no error in the judgment of the Court of Appeals, and it is therefore affirmed."

The period of Lennon's refusal to handle the Ann Arbor car was five hours. The period of this strike was from February 4 to 22, inclusive, 1921. Lennon was on the run with his train. In this case

the strikers came to the mine to work on the morning of February 4, and when the strike order was read to them they left, but came back on Februray 23. In the meantime a number of the men worked upon February 9 cleaning out coal which had been blasted, so that they could get their pay for it. There was not a *bona fide* abandonment of his employment by Lennon, and there was not a *bona fide* abandonment of their employment by the strikers in this case. The decision in the Lennon case applies in principle here.

## THE JUDGMENT OF MR. JUSTICE ASTBURY IN THE REED CASE.

In the British general strike of May 4 to 12, 1926, called in sympathy with the coal strikers, there was an attempt to coerce the government as well as the operators of many industries. The elements which exist in a strike at a single coal mine were present in that strike. That is, the moving parties intentionally caused the operation of each industry to close by withholding all labor and persuading others not to supply the places of the strikers, and this to compel a compliance with the demands of the strikers.

The Trade Disputes Act, 1906, 6 Edw. 7, chapter 47, entitled, "An Act to Provide for the Regulation of Trades Unions and Trade Disputes," December 21, 1906, provided in section 1:

> "An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable."

It provided by section 3:

> "An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract or employment or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labor as he wills."

In the case of *National Sailors' and Firemen's Union of Great Britain and Ireland v. G. Reed, and Others*, in the High Court of Justice, Chancery Division, before Mr. Justice Astbury, the union prayed for an injunction against some of its executive officers to restrain them from calling members of the union out on strike as part of the general strike. The injunction was granted upon May 11, 1926. Mr. Justice Astbury in stating his judgment said:

> "The so-called general strike called by the Trades Union Congress is illegal and contrary to law, and those persons inciting or taking part in it are not protected by the Trades Disputes Act of 1906. No trade dispute has been alleged or shown to exist in any of the unions affected, except in the miner's case, and no trade dispute does or can exist between the Trades Union Congress on the one hand and the government and the nation on the other. The orders of the Trades Union Council above referred to are therefore unlawful and the defendants are at law acting illegally in obeying them and can be restrained by their own union from doing so."

The Trade Disputes Act of 1906 is quoted in appendix VI, page 94, to a volume entitled "Three Speeches on the General Strike," by the Right Hon. Sir John Simon, M. P., published by MacMillan & Co., Limited, St. Martin's street, London, 1926. The opinion of Mr. Justice Astbury is printed as appendix II, page 64, same volume.

## THE ACT OF CONGRESS AS TO ARSENAL OR ARMORY EMPLOYEES.

Congress has made it a misdemeanor to persuade or induce an artificer or workman in an arsenal or armory to leave his employment under the circumstances indicated by the statute which we set out:

> "SEC. 10207 (Crim. Code, sec. 43). *Enticing workmen from arsenals or armories.* Whoever shall procure or entice any artificer or workman retained or employed in any arsenal or armory to depart from the same during the continuance of his engagement, or to avoid or break his contract with the United

States; or whoever, after due notice of the engagement of such workman or artificer, during the continuance of such engagement, shall retain, hire or in anywise employ, harbor or conceal such artificer or workman, shall be fined not more than fifty dollars, or imprisoned not more than three months, or both."

Sec. 10207, U. S. Compiled Stat. 1918, Compact Ed., March 4, 1909, C. 321, sec. 43, 35, Stat. 1097.

## INJURING OTHERS.

In the case of *Aikens v. Wisconsin*, 195 U.S. 194, 204, 205, 49 L.Ed. 154, the Court held valid a statute of Wisconsin providing for the punishment of a combination for the purpose of willfully or maliciously injuring another in his business, as applied to a combination of newspaper manufacturers maliciously to injure a rival paper by discriminating in their advertising rates against the advertising patrons of the rival paper.

The Court, by Mr. Justice Holmes, said:

"It has been considered that *prima facie*, the intentional infliction of temporal damages is a cause of action, which, as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape. (*Mogul S. S. Co. v. McGregor*, L. R. 23, Q. B. Div. 598, 613 [1892], A. C. 25, 61 L. J. Q. B. N. S. 295, 66 L. T. N. S. 1, 40 Week. Rep. 337, 7 Asp. Mar. L. Cas. 120, 56 J. P. 101.) If this is the correct mode of approach, it is obvious that justifications may vary in extent, according to the principle of policy upon which they are founded, and that while some—for instance, at common law, those affecting the use of land—are absolute (*Bradford v. Pickles* [1895], A. C. 587), others may depend upon the end for which the act is done. (*Moran v. Dunphy*, 177 Mass. 485, 487, 52 L. R. A. 115, 83 Am. St. Rep. 289, 59 N. E. 125; *Plant v. Woods*, 176 Mass. 492, 51 L. R. A. 339, 79 Am. St. Rep. 330, 57 N. E. 1011; *Squires v. Wason Mfg. Co.*, 182 Mass. 137, 140, 141, 65 N. E. 32.) See cases cited in 62 L. R. A. 673. It is no sufficient answer to this line of thought that motives are not actionable, and that the standards of the law are eternal. That is true in determining what a man is

bound to foresee, but not necessarily in determining the extent to which he can justify harm which he has foreseen. (*Quinn v. Leathem* [1901], A. C. 495, 524, 70 L. J. P. C. N. S. 76, 85 L. T. N. S. 289, 50 Week. Rep. 139, 65 J. P. 708.)

. . . . . .

"However these things may be, we have said enough to show that there is no anomaly in a statute, at least which punishes a combination such as is charged here. It has been held that even the free use of land by a single owner for purely malevolent purposes may be restrained constitutionally, although the only immediate injury is to a neighboring landowner. (*Rideout v. Knox*, 148 Mass. 368, 2 L. R. A. 81, 12 Am. St. Rep. 560, 19 N. E. 390.) Whether this decision was right or not, when it comes to the freedom of the individual, malicious mischief is a familiar and proper subject for legislative repression. (*Com. v. Walden*, 3 Cush. 558. Still more are combinations for the purpose of inflicting it.) It would be impossible to hold that the liberty to combine to inflict such mischief, even upon such intangibles as business or reputation, was among the rights which the 14th Amendment was intended to preserve."

Pollock on Torts, 11th edition, 1920, pp. 21, 22, 23, 329.

In *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 252, 256, the Court, by Mr. Justice Pitney, said:

"In short, plaintiff was and is entitled to the good will of its employees, precisely as a merchant is entitled to the good will of his customers although they are under no obligation to continue to deal with him. The value of the relation lies in the reasonable probability that, by properly treating its employees, and paying them fair wages, and avoiding reasonable grounds of complaint, it will be able to retain them in its employ, and to fill vacancies occurring from time to time by the employment of other men on the same terms. The pecuniary value of such reasonable probabilities is incalculably great, and is recognized by the law in a variety of relations.

. . . . . .

"In any aspect of the matter, it cannot be said that defendants were pursuing their object by lawful means. The question of their intentions—of their *bona fides*—cannot be ignored. It enters into the question of malice. As Bowen, L. J., justly said,

in the Mogul S. S. case, L. R. 23, Q. B. Div. 613: 'Intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse.' And the intentional infliction of such damage upon another, without justification or excuse, is malicious in law."

*Walker v. Cronan*, 107 Mass. 555, 562.

In *Plant v. Woods*, 176 Mass. 492, 499, 500; 57 N. E. 1011; 79 Am. St. Rep. 330; 51 L. R. A. 339, the Court, by Judge Hammond, said:

"It is said also that, where one has the lawful right to to a thing, the motive by which he is actuated is immaterial. One form of this statement appears in the first head-note in *Allen v. Flood*, as reported in (1898) A. C. 1, as follows: 'An act lawful in itself is not converted by a malicious or bad motive into an unlawful act so as to make the doer of the act liable to a civil action.' If the meaning of this and similar expressions is that where a person has the lawful right to do a thing irrespective of his motive, his motive is immaterial, the proposition is a mere truism. If, however, the meaning is that where a person, if actuated by one kind of a motive, has a lawful right to do a thing, the act is lawful when done under any conceivable motive, or that an act lawful under one set of circumstances is therefore lawful under every conceivable set or circumstances, the proposition does not commend itself to us as either logically or legally accurate.

"In so far as a right is lawful, it is lawful, and in many cases the right is so far absolute as to be lawful whatever may be the motive of the actor, as where one digs upon his own land for water (*Greenleaf v. Francis*, 18 Pick, 117), or makes a written lease of his land for the purpose of terminating a tenancy at will (*Groustra v. Bourges*, 141 Mass. 7), but in many cases the lawfulness of an act which causes damage to another may depend upon whether the act is for justifiable cause; and this justification may be found sometimes in the circumstances under which it is done irrespective of motive, sometimes in the motive alone, and sometimes in the circumstances and motive combined.

"This principle is of very general application in criminal law,

and also is illustrated in many branches of the civil law, as in cases of libel and of procuring a wife to leave her husband. (*Tasker v. Stanley*, 153 Mass. 148, and cases therein cited.) Indeed the principle is a prominent feature underlying the whole doctrine of privilege, malice, and intent. See on this an instructive article in 8 Harvard Law Review, 1, where the subject is considered at some length.

"It is manifest that not much progress is made by such general statements as those quoted above from *Allen v. Flood*, whatever may be their meaning.

"Still standing for solution is the question, Under what circumstances, including the motive of the actor, is the act complained of lawful, and to what extent?"

*Hollenbeck v. Ristine*, 105 Ia. 488, 491; 75 N. W. 355, 67 Am. St. Rep. 306.

*Lucke v. Clothing Cutters, &c.*, 77 Md. 396, 409, 410; 39 Am. St. Rep. 421, 430, 431.

*Chipley v. Atkinson*, 23 Fla. 206, 210, 215, 217; 11 Am. St. Rep. 267.

The question of the circumstances under which there may be a privilege to injure was discussed by the then judge, now Mr. Justice Holmes, in an article entitled "Privilege, Malice and Intent" (April 25, 1894), 8 Harvard Law Review, 1. The learned writer said:

"It will be noticed that I assume that we have got past the question which is answered by the test of the external standard. There is no dispute that the manifest tendency of the defendant's act is to inflict temporal damage upon the plaintiff. Generally, that result is expected, and often at least it is intended. And the first question that presents itself is why the defendant is not liable without going further. The answer is suggested by the commonplace, that the intentional infliction of temporal damage, or the doing of an act manifestly likely to inflict such damage and inflicting it, is actionable if done without just cause. When the defendant escapes, the court is of opinion that he has acted with just cause. There are various justifications. In these instances, the justification is that the defendant is privileged knowingly to inflict the damage complained of.

"But whether, and how far, a privilege shall be allowed is a question of policy. Questions of policy are legislative questions, and judges are shy of reasoning from such grounds. Therefore, decisions for or against the privilege, which really can stand only upon such grounds, often are presented as hollow deductions from empty general propositions like *sic utere tuo ut alienum non lacdas*, which teaches nothing but a benevolent yearning, or else are put as if they themselves embodied a postulate of the law and admitted of no further deduction, as when it is said that, although there is temporal damage, there is no wrong; whereas, the very thing to be found out is whether there is a wrong or not, and if not, why not.

"When the question of policy is faced it will be seen to be one which cannot be answered by generalities, but must be determined by the particular character of the case, even if everybody agrees what the answer should be. I do not try to mention or to generalize all the facts which have to be taken into account; but plainly the worth of the result, or the gain from allowing the act to be done, has to be compared with the loss which it inflicts. Therefore, the conclusion will vary, and will depend on different reasons according to the nature of the affair." (pp. 2 and 3 *id.*)

. . . . . .

"Perhaps one of the reasons why judges do not like to discuss questions of policy, or to put a decision in terms upon their views as lawmakers, is that the moment you leave the path of merely logical deduction you lose the illusion of certainty which makes legal reasoning seem like mathematics. But the certainty is only an illusion, nevertheless. Views of policy are taught by experience of the interests of life. Those interests are fields of battle. Whatever decisions are made must be against the wishes and opinion of one party, and the distinctions on which they go will be distinctions of degree. Even the economic postulate of the benefit of free competition, which I have mentioned above, is denied by an important school." (p. 7 *id.*)

. . . . . .

"The ground of decision really comes down to a proposition of policy of rather a delicate nature concerning the merit of the particular benefit to themselves intended by the defendants,

and suggests a doubt whether judges with different economic sympathies might not decide such a case differently when brought face to face with the issue." (p. 8 *id.*)

. . . . . .

"The cases which I have cited, by way of illustration, come from different states, and might not be regarded as being so consistent with each other as I have assumed them to be. But in all such cases the ground of decision is policy; and the advantages to the community, on the one side and the other, are the only matters really entitled to be weighed." (p. 9 *id.*)

In an article upon "The Closed Market, the Union Shop, and the Common Law," by Wm. Draper Lewis, 18th Harvard Law Review, 444, 450, 451 (April, 1905), the learned writer said:

"The assumption of those judges who hold the defendants' acts in the cases referred to *prima facie* illegal, because those acts have injured the plaintiff, would appear to be necessary to any advancement of our law. A state cannot recognize the existence in the individual of an inherent right to injure his fellowman. It is only in the general recognition by our courts, of the principle that a man is *prima facie* liable for any injury to others caused by him, that we can hope to continue to meet new forms of private injury as they arise. It is inevitable that from time to time acts which heretofore have been performed under circumstances which either did not injure others or for which the actors had a valid excuse, come to be performed under circumstances which either produce injury or deprive the usual excuse of its validity. When this occurs, courts are confronted with a new question in the law of torts. This is what is now occurring in the industrial world. In the past the act of buying and selling has either been without resulting injury to anyone, or if injury has resulted, as in the case where sharp competition has driven one of the competitors to the wall, the interest of the community in procuring cheaper goods has formed a sufficient legal excuse for the injury. To-day, however, owing to the greater power of combination, the act of granting or withholding one's goods or labor can be made under circumstances which produce injury to others, and deprive the actors of any legal excuse for that injury. The worst modern examples of this are the attempts, of which the acts

of the defendants in the cases discussed are instances, of associations of capitalists and of associations of laborers to close the market to outsiders or the shop to the nonunion man or member of a rival union. In all of them the act of the defendants in granting or withholding their goods or labor was an act oppressive to those who would deal with the plaintiff. Its intent was to drive the plaintiff out of the trade or business which the defendants desired to monopolize for themselves. However, words sounding of 'inherent rights' may momentarily cloud the issue, in the long run I believe our courts will, without exception, declare this form of 'boycott' illegal, and, as in Pennsylvania and Massachusetts, hold those who institute it liable for the injury they inflict upon others. To right the wrong inflicted on particular individuals, legislation is not needed. What is needed is to get rid of the notion that there are some acts, such as buying and selling, which a man has an inherent right to do under all circumstances, and hold to the fundamental position of our common law—that he who injures his fellowman is liable for that injury, unless he can show that the community regards his act as conducive to the public welfare."

## ECONOMICS AND PUBLIC POLICY.

After the view had been taken in the earlier cases that strikes were lawful in some instances, the opinions in subsequent cases have not usually referred to the basis of the doctrine. They have addressed themselves to the specific facts, and stated whether they thought, on those facts, the strike was lawful or unlawful. This is the usual judicial practice on subjects where the ground has once been broken. If the strike was on a question of the future interests of the employees with regard to the wages they should receive, hours of work, or working conditions, the Court has said the strike was lawful; if the strike was for other purposes, the Court has said the strike was unlawful. The decisions holding strikes unlawful have confined the doctrine to the grounds we refer to, and they have done this just as effectively, although, in the cases where strikes have been held unlawful, a particular objection has been stated to permitting the

strike. A strike merely to increase the power of a labor union has not been privileged. Such increase of power might be used for other purposes than to make better bargains for the laborers as to wages, hours or working conditions. To permit strikes for the reasons stated was to do so on the grounds of economics and public policy. The power to strike increased the bargaining power of the laborers and a stronger bargaining power for the purposes named was deemed useful and for the public welfare. It has been thought by the courts that it would be to the public welfare to permit them although the employer and his customers suffered, and sometimes the public suffered. The question, however, has been in essence a legislative one, and, although the courts have established a rule, the legislatures are not thereby prevented from taking a different view in regard to the public welfare and forbidding such strikes.

If the privilege to strike should be regarded as a constitutional right, would all strikes come within that right, including those which have been held legal and those which have been held illegal?

If a distinction should be drawn, upon what basis could it be raised?

There is no constitutional principle upon which a distinction could be made between the strikes which have been held legal by the decisions and those which have been held illegal.

We quote from some judicial opinions which state the basis of the rule permitting strikes under some conditions.

In *Thomas v. Cincinnati, N. O. & T. P. Ry. Co.*, 62 Fed. 803, 817, where it was held that a sympathetic, boycotting strike to prevent the use of Pullman cars upon a railroad was illegal, the Court, through Circuit Judge Taft, in discussing the legal right of a labor union, said:

> "Now, it may be conceded in the outset that the employees of the receiver had the right to organize into or to join a labor

union which should take joint action as to their terms of employment. It is of benefit to them and to the public that laborers should unite in their common interest and for lawful purposes. They have labor to sell. If they stand together, they are often able, all of them, to command better prices for their labor than when dealing singly with rich employers, because the necessities of the single employee may compel him to accept any terms offered him."

That the reason above given is one of public policy is indicated in 3 Williston on Contracts, section 1655, where, after quoting such statement, the eminent author, said:

"Such language certainly seems to mean more than an assertion that such organizations are not necessarily either tortuous to other persons or a crime against the State. If similar words were used of manufacturers, 'They have goods to sell and if they stand together they are often able, all of them, to command better prices for their goods than when dealing singly with the public,' the reasoning would be thought to show conclusively that the agreement between the manufacturers was illegal at common law in the sense of being unenforceable and regarded as opposed to public policy. Presumably, also, if it was said of manufacturers, 'They have labor to buy; if they stand together they are often able, all of them, to command more labor for their money than in dealing singly with their employees,' it would be thought to prove the illegality of an agreement by the manufacturers in the combination, at least if it was part of the subject of the agreement to bring all manufacturers into the agreement."

The reasons are stated in the case of *Wabash R. Co. v. Hannahan,* 121 Fed. 563, 568. The court, by District Judge Adams, said:

"An employee has an unquestionable right to place a price and impose conditions upon his labor at the outset of his employment, or unless restrained by contract obligations, upon the continuance of his labor at any time thereafter; and, if the terms and conditions are not complied with by the employer, he has a clear right either not to engage, or having engaged in his service, to cease from work. What one may do all may do.

"They may seek and obtain counsel and advice concerning their rights, duties and obligations in relation to their employer, and persons interested in their welfare may advise, aid and assist them in securing such terms and conditions of service as will best subserve their interests, and what they may lawfully do singly or together they may organize and combine to accomplish.

"In like manner, as capital is combined for legitimate purposes, so labor may combine for legitimate purposes, but this right of combination, and the resulting right to strike or quit their employment, is a weapon for the defense and protection of employees, and not a weapon of attack. They may, by peaceful and lawful combination and concert of action, be able to so control the supply of labor as to compel the employer to come to their terms, but they are not at liberty to make use of this weapon to otherwise interfere with or injure the employer or coëmployee. The clear line of demarcation, recognized by all the authorities, is that the lawful and permissible strike must not be attended by violence to or destruction of property or by other coercive measures intended to prevent the employer from securing other employees or otherwise carrying on his business according to his own judgment."

The foregoing reasons are not on constitutional grounds, but on grounds of economics and public policy.

The ground of the rule was stated in the dissenting opinion of Judge Holmes, in *Vegelahn v. Guntner*, 167 Mass., at pages 105, 106, 107, 108, a case that involved picketing which grew out of a strike.

"I agree, whatever may be the law in the case of a single defendant (*Rice v. Albee*, 164 Mass. 88), that when a plaintiff proves that several persons have combined and conspired to injure his business, and have done acts producing that effect, he shows temporal damage and a cause of action, unless the facts disclose, or the defendants prove, some ground of excuse or justification. And I take it to be settled, and rightly settled, that doing that damage by combined persuasion is actionable, as well as doing it by falsehood or by force. (*Walker v. Cronin*, 107 Mass. 555; *Morasse v. Brochu*, 151 Mass. 567; *Tasker v. Stanley*, 153 Mass. 148.)

"Nevertheless, in numberless instances the law warrants the intentional infliction of temporal damage because it regards it as justified. It is on the question of what shall amount to a justification, and more especially on the nature of the considerations which really determine or ought to determine the answer to that question, that judicial reasoning seems to me often to be inadequate. The true grounds of decision are considerations of policy and of social advantage, and it is vain to suppose that solutions can be attained merely by logic and the general propositions of law which nobody disputes. Propositions as to public policy rarely are unanimously accepted, and still more rarely, if ever, are capable of unanswerable proof. They require a special training to enable anyone even to form an intelligent opinion about them. In the early stages of law, at least, they generally are acted on rather as inarticulate instincts than as definite ideas for which a rational defense is ready.

. . . . . .

"I have seen the suggestion made that the conflict between employers and employed is not competition. But I venture to assume that none of my brethren would rely on that suggestion. If the policy on which our law is founded is too narrowly expressed in the term free competition, we may substitute free struggle for life. Certainly the policy is not limited to struggles between persons of the same class competing for the same end. It applies to all conflicts of temporal interests."

And in the dissenting opinion of Chief Justice Holmes, in *Plant v. Woods*, he said, at page 505 of 176 Massachusetts:

"To come directly to the point, the issue is narrowed to a question whether, assuming that some purposes would be a justification, the purpose in this case of the threatened boycotts and strikes was such as to justify the threats. That purpose was not directly concerned with wages. It was one degree more remote. The immediate object and motive was to strengthen the defendants' society as a preliminary and means to enable it to make a better fight on questions of wages or other matters of clashing interests. I differ from my brethren in thinking that the threats were as lawful for this preliminary purpose as for the final one to which strengthening the union was a means. I think that unity of organization is necessary to make the

contest of labor effectual, and that societies of laborers lawfully may employ in their preparation the means which they might use in the final contest.

"Although this is not the place for extended economic discussion, and although the law may not always reach ultimate economic conceptions, I think it well to add that I cherish no illusions as to the meaning and effect of strikes. While I think the strike a lawful instrument in the universal struggle of life, I think it pure phantasy to suppose that there is a body of capital of which labor as a whole secures a larger share by that means."

In *Duplex Printing Co. v. Deering*, 254, U. S. 443, 485, 488, 65 L. Ed. 349, 364, 366, speaking of the discussions which led up to the enactment of the Clayton Act, Mr. Justice Brandeis, in a dissenting opinion, stated:

"The change in the law by which strikes once illegal and even criminal are now recognized as lawful was effected in America largely without the intervention of legislation. This reversal of a common law rule was not due to the rejection by the courts of one principle and the adoption in its stead of another, but to a better realization of the facts in industrial life.

. . . . . .

"It was objected that, due largely to environment, the social and economic ideas of judges, which thus became translated into law, were prejudicial to a position of equality between working man and employer; that, due to this dependency upon the individual opinion of judges, great confusion existed as to what purposes were lawful and what unlawful; and that, in any event, congress, not the judges, was the body which should declare what public policy in regard to the industrial struggle demands.

. . . . . .

"Because I have come to the conclusion that both the common law of a state and a statute of the United States declare the right of industrial combatants to push their struggle to the limits of the justification of self-interest, I do not wish to be understood as attaching any constitutional or moral sanction to that right. All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community. The conditions developed in industry may be such

> that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest, and to declare the duties which the new situation demands. This is the function of the legislature, which, while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat."

In *Truax v. Corrigan*, 257 U. S. 312, 361, 362, 363, 66 L. Ed. 254, 276, 277, where the Court held invalid a statute of Arizona against injunctions in certain industrial disputes, Mr. Justice Brandeis, in a dissenting opinion, said:

> "In the United States the rules of the common law governing the struggle between employer and employee have likewise been subjected to modifications. These have been made mainly through judicial decisions. The legal right of workingmen to combine and to strike in order to secure for themselves higher wages, shorter hours, and better working conditions received early general recognition. But there developed great diversity of opinion as to the means by which, and also as to the persons through whom, and upon whom pressure might permissibly be exerted in order to induce the employer to yield to the demands of the workingmen. Courts were required, in the absence of legislation, to determine what the public welfare demanded; whether it would not be best subserved by leaving the contestants free to resort to any means not involving a breach of the peace or injury to tangible property; whether it was consistent with the public interest that the contestants should be permitted to invoke the aid of others not directly interested in the matter in controversy; and to what extent incidental injury to persons not parties to the controversy should be held justifiable."

We find nothing in the majority opinions in the two cases last referred to in conflict with these statements by Mr. Justice Brandeis.

That the rule holding certain strikes legal is one of economics and public policy is indicated by the two following cases:

*Gill Engraving Company v. Doerr*, 214 F. 111, 120.

*Karges Furniture Company v. Amalgamated Woodworkers' Union*, 165 Ind. 421; 75 N. E. 877; 2 L. R. A. n. s. 788, 794, 795.

## XIV.

### The Evils of Strikes Have Been Recognized by Congress and Many Legislatures.

A strike is not well adapted to bring about a just decision of an industrial dispute. It arouses bad feelings between the contestants. The relative strength of the opponents has more effect on the result than the merits of the case. The weaker side, though right, often loses. The stronger side, though wrong, often wins. If the strike is prolonged, the families of the strikers suffer deprivations, and the employer suffers business disruption and damage. There is usually moral intimidation by the strikers against other workers, to prevent their employment. There is sometimes injury to or destruction of property, physical intimidation, assaults, injuries to persons, and there are occasionally losses of lives.

The bad consequences of lockouts and strikes and the need to provide for the settlement of industrial disputes upon a calm consideration of the facts and the application of just principles have been understood by many legislative bodies and have led to the enactment of statutes for arbirtation, mediation and conciliation of such controversies, some of which we cite:

The Act of Congress of May 20, 1926, entitled: "An Act To provide for the prompt disposition of disputes between carriers and their employes and for other purposes."

Public No. 257, 69th Congress.

Compiled Laws of Colorado, 1921, sections 4202-4204.

Vol. 2, Revision of Connecticut Statutes, 1918, sections 5332-5335.

1 Park's Ann. Code of Georgia, section 2141, page 884.

1 Idaho Compiled Stat., 1919, sections 2280-2296.

Sec. 7, art. 13, Constitution of Idaho.

3 Ida. Comp. Stat. 1919, page 2753.

4 Callaghan's Ill. Stat. Ann. (Cahill & Jones), sections 1-13, chapter 48, page 3471.

3 Burns Ann. Indiana Statutes, 1926, Watson's Revision, sections 9525-9534.

Code of Iowa, 1924, sections 1496-1509.

Revised Statutes of Maine, 1926, sections 1-8, page 746.

1 Ann. Code of Maryland (Bagby), section 2, art. 1.

2 General Laws of Massachusetts, 1921, chapter 150.

Constitutions and Statutes of Louisiana, Wolff, pages 55-54.

Article 176, Constitution of Louisiana.

2 Compiled Laws of Michigan, 1915, sections 5564-5577, chapter 104, page 2097.

Laws of Minnesota, 1921, section 15, chapter 81.

2 Revised Statutes of Missouri, 1919, sections 6756-6765.

1 Revised Codes of Montana, 1921, sections 3052-3060.

1 Revised Laws of Nevada, 1912, sections 1921-1934.

1 General Code of Ohio, Revised Edition, Page's Compact Edition, section 871-22, subdivision 8.

2 Compiled Laws of Oklahoma, 1921, sections 7167-7173.

Art. 9, sections 18 and 42, Constitution of Oklahoma.

Art 6, section 21, Constitution of Oklahoma.

1 Purdon's Digest, Penn., page 357.

5 Purdon's Digest, 5296, Act of 2d of June, 1913, sec. 17, P. L. 396.

Pennsylvania Statutes, supplement, 1924 (West Publishing Company), section 50A 1706.

The preamble to the Conciliation Act of Pennsylvania of 26 April, 1883, section 1, P. L. 15, 1 Purdon's Digest, sec. 67, page 357, states:

> "Whereas, differences arise between persons engaged in the iron, steel, glass, textile fabrics and coal trades in this state and strikes and lockouts result therefrom, which paralyze these important industries, bring great loss upon both employer and employee and seem to find their only solution in starvation or force, which does not accord with the teachings of humanity and the controlling policy of our law."

Subdivisions 5 and 9 of section 3076, sections 3634-3644, compiled Laws of Utah, 1917.

Sections 5858-5867, General Laws of Vermont, 1921.

1 Wisconsin Statutes, 1923, section 13, chapter 104, page 1119.

## XV.

### The Strike Attacked the Constitutional As Well As the Legal Rights of the Fuel Company and Its Customers.

The defendant, living under the protection of the state, is bound to so conduct himself as not to hazard or infringe the rights of others who are also living under its protection. The Constitution does not permit him to attack the rights of other persons.

The Mackie Fuel Company and its customers had the constitutional right to do business. This right was assailed and its enjoyment stopped by the strike.

Both individuals and corporations have a constitutional right to do business.

The specific facts are indicated:

A statute punishing the taking or receiving of a fee for furnishing employment was held in violation of the Fourteenth Amendment.

*Adams v. Tanner*, 244 U. S. 590, 61 L. Ed. 1336, L. R. A. 1917F 163.

An ordinance was held in violation of the Fourteenth Amendment which sought to prevent colored persons occupying residence property in white residence districts, and would have the effect, if enforced, of preventing the sales of such real property to colored people.

*Buchanan v. Worley*, 245 U. S. 60, 62 L. Ed. 149, L. R. A. 1918C 210, Ann. Cas. 1918A 1201.

The right to do business is a legal property right.

A case where an injunction was sustained against a sympathetic, boycotting strike.

*Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 465, 65 L. Ed. 349, 356.

A statute was held invalid which sought to prevent the issuance of injunctions in certain labor disputes.

*Truax v. Corrigan*, 257 U. S. 312, 327, 66 L. Ed. 254, 260.

Men have a constitutional right to work.

A statute was held invalid which provided that employers of more than five workers should employ not more than a specified percentage of aliens.

*Truax v. Raich*, 239 U. S. 33, 60 L. Ed. 131, L. R. A. 1916D 545, Ann. Cas. 1917B 283.

These elementary rights were infringed by the strike. The Fuel Company for a time was prevented from operating its mine, and every person dependent upon that mine for a supply of fuel was interfered with in the prosecution of his business. People whose work was dependent upon this supply of fuel were liable to be injured.

The rights of the Fuel Company and its customers to operate their industries are not subject to impairment or destruction at the whim of anybody, and an officer of a labor union is not privileged to inflict such impairment or destruction any more than any person who is not an officer or member of the labor union. There can be no constitutional right in an officer of a labor union to do such an act which cannot also be vested in every person whatsoever. There is no such right in anybody in or out of the labor union. The calling of the strike in this case was malevolent and tyrannical, and cannot be sheltered under the Thirteenth Amendment or the Fourteenth Amendment.

## XVI.

### An Act Lawful for One May Be Unlawful for Several.

Though an act done by one person be lawful, the same act done by a combination of persons in pursuance of a wrongful intention, will be unlawful, and the combining of persons with a wrongful intention in order to do such act will be unlawful.

A case of a conspiracy to procure the escape of a patient from a state hospital for the insane.

*Drew v. Thaw*, 235 U. S. 432, 59 L. Ed. 302, 307.

A conspiracy to willfully injure another in his business.

*Aikens v. Wisconsin*, 195 U. S. 194, 49 L. Ed. 154.

Combinations in restraint of trade.

*Grenada Lumber Company v. Mississippi*, 217 U. S. 433, 440, 441, 54 L. Ed. 826.

*Eastern States Lumber Association v. United States*, 234 U. S. 600, 614, 58 L. Ed. 1500.

## XVII.

### The Strike Was Unlawful Under the Decisions.

The strike of the mine of the Mackie Fuel Company was called by Alexander Howat, president, and August Dorchy, vice president of District No. 14, a labor union, with membership of some thousands of coal miners, working in Crawford and Cherokee counties, Kansas, and many working in Missouri in the vicinity of those counties. It was to compel the Mackie Fuel Company to pay the claim of Mishmash, who was not and had not been for a year and a half an employee of the Mackie Fuel Company. During a period prior to April 1, 1918, when Mishmash had worked for the Fuel Company, if he were over nineteen years of age, he would have been entitled to pay at the rate of $5 a day, but if he were under nineteen years he would have been entitled to pay at the rate of $3.65 per day. The Bible of the Mishmash family contained at different places two conflicting entries of the date of his birth, a year apart. One showed the date of his birth as August 31, 1898, the other as August 31, 1899. The Mackie Fuel Company relied upon the later date. He had been paid the lesser amount, and there was a controversy between the Fuel Company and Mishmash

whether during that period he was over nineteen years of age and entitled to the greater amount. Neither Howat nor Dorchy was an employee of the Mackie Fuel Company. They were seeking to exercise their great power as president and vice president of District No. 14 to compel the Mackie Fuel Company to pay the claim of Mishmash. Courts were established to pass upon such claims. Howat and Dorchy, backed by District 14, arrogated the function of a court.

The decisions on the subjects of lawful and unlawful strikes show that this strike was unlawful. It was not to establish any basis for wages, hours, or working conditions, but was to undertake the function of a court. A strike is privileged on the points first named because the employees, by means of a strike, either actual or pretential, are placed in a stronger bargaining position, and, as a result, will be enabled to obtain better terms. A strike is not privileged for other purposes.

There was no question of raising wages, and there was no dispute as to wages between the members of the Union then working at Mine H and the Mackie Fuel Company. The defendant induced the men working at Mine H to strike, in violation of their contracts of employment, in order to prevent resort to the courts to settle a controversy between it and its ex-employee Mishmash. The Mackie Fuel Company insisted there had been no arbitration or award made under the terms of any contract. Moreover, it had a constitutional right to resort to the courts to determine three things: (1) Whether or not there had been such an arbitration; (2) if there had, then whether or not there was fraud inherent therein which would vitiate; (3) if there had not, then whether the company's contention or that of its ex-employee was correct.

Sections 418, 429, G. S. Kansas, 1915.

These questions the Mackie Fuel Company would have a right to submit to a court under the "due process" and "equal protection" clauses of the Fourteenth Amendment to the Constitution of the United States. Dorchy insists here that a statute which, if applied to him, prevents him from coercing the Fuel Company into surrendering the protection of the Federal Constitution is of itself unconstitutional and void. A statute which makes a crime the commission of an act which has been already declared illegal by judicial decisions cannot be held to be arbitrary or so unreasonable as to violate the Federal Constitution.

In *Plant v. Woods*, 176 Mass. 504, Holmes, Chief Justice, said, in a dissenting opinion:

> "I agree that the conduct of the defendants is actionable unless justified. (*May v. Wood*, 172 Mass. 11, 14, and cases cited.) I agree that the presence or absence of justification may depend upon the object of their conduct; that is, upon the motive with which they acted. (*Vegelahn v. Guntner*, 167 Mass. 92, 105, 106.) *I agree, for instance, that if a boycott or a strike is intended to override the jurisdiction of the courts by the action of a private association, it may be illegal.* (*Weston v Barnicoat*, 175 Mass. 454.)"

(The italics are ours.)

In the case of *Weston v. Barnicoat*, 175 Mass. 454, 457, 458, 56 N. E. 619, an action for libel, opinion by Holmes, Chief Justice, it was stated:

> "Several rulings were asked on the question of privilege. As we have said, the case is to be considered solely on the footing of libel. From this point of view it is perfectly plain that the judge could not have ruled that the communication was privileged as matter of law. The jury well might have found facts that would cut at the roots of such a ruling. . . . They might have found that the whole organization was a mere scheme to oust the courts of their jurisdiction and to enforce colorable claims of the members by a boycott intended to take the place of legal process, and that there was no pretense of any

> duty about the matter. . . . More specifically, a false statement of the kind manifestly hurtful to a man in his credit and business, and intended to be so, is not privileged because made in obedience to the requirements of a voluntary association got up for the purpose of compelling by a boycott the satisfaction of its members' claims to the exclusion of a resort to the courts."

In the case of *Giblan v. National Amalgamated Laborers Union*, 2 K. B. 600 (1903), persons who caused a master to discharge his servant by threat of a strike, to compel the servant to pay a debt, were held liable to the servant.

It is unlawful to cause the discharge of a servant, by threat of a strike, on account of a controversy over the delivery of a book possessed by the servant.

*Cornell v. Stalker*, 29 Misc. 423, 45 N. Y. Supp. 1048.

It is unlawful to strike to compel an employer to pay money to a labor union as a fine for an alleged violation of an agreement between the employer and the union.

*Burke v. Fay*, 128 Mo. App. 690; 107 S. W. 408.

In *Duplex Printing Press Company v. Deering*, 254 U. S. 443, 41 S. Ct. 172, 65 L. Ed. 349, the International Association of Machinists, an unincorporated association having a large membership, united into a combination to compel the complainant to unionize its factory, enforce the closed shop, the eight-hour day, and the union schedule of wages, by boycotting the interstate trade of that company. They conducted in New York city a campaign of threatening the customers of the printing-press company, the truck companies that carried its presses, and those who were engaged in the work of setting up such presses, with injury to them in their business, if they continued to deal with the Duplex Company or its presses. It was an attempt by coercion to use the right of trade of persons having nothing to do with the controversy between the Duplex

Company and the machinists' union, and having no interest in it, to injure the Duplex Company in its business. This was decided not to be within section 20 of the Clayton act. It was held, following the case of *Loewe v. Lowler*, supra, to be an unlawful combination in restraint of interstate trade and was enjoined. In the Duplex Printing Press case there was no charge that defendants were inducing employees to break their contracts, nor was it urged in this Court that defendants threatened acts of violence. In the opinion it was said:

> "To instigate a sympathetic strike in aid of a secondary boycott cannot be deemed 'peaceful and lawful' persuasion. In essence it is a threat to inflict damage upon the immediate employer, between whom and his employees no dispute exists, in order to bring him, against his will, into a concerted plan to inflict damage upon another employer who is in dispute with his employees."

So here, Dorchy, who was not an employee of the Fuel Company, was instigating a strike of the employees of the Fuel Company in order to compel the Fuel Company to settle a dispute between it and a man who was not then an employee of the company, and who did not intend so to become. There was no dispute between the Fuel Company and its employees. The sole purpose of the strike was by intimidation and coercion to prevent the Fuel Company from exercising the rights granted to it under the Constitution of the United States and the state of Kansas of resorting to the courts for the determination of a question arising under a contract of employment which had already been terminated. In other words, the strike was for the purpose of ousting the courts of jurisdiction to herein determine the controversy in question. This cannot be done by conclusive arbitration clauses.

*Potomac Steamboat Company v. Baker Salvage*, 123 U. S. 40; 8 Sup. Ct. 33.

*Guaranty Trust & Safe Deposit Co. v. Green Cove Springs & C. R. Co.*, 139 U. S. 137; 35 L. Ed. 116.

*New York Home Ins. Co. v. Morris*, 20 Wall. 445; 22 L. Ed. 365.

*Richardson v. Emmert*, 44 Kan. 362.

5 C. J. 42.

*Jefferson F. Ins. Co. v. Bierce*, 183 Fed. 588.

No more should it be done through strikes.

A party cannot barter away in advance its right to remove cases from the State to the Federal Court.

*Home Insurance Company v. Morse*, 20 Wallace 445, 451; 22 L. Ed. 365.

*Doyle v. Continental Insurance Company*, 4 Otto (94 U. S.) 535; 24 L. Ed. 148.

In the case of *Chambers v. Baltimore & Ohio Railroad Company*, 207 U. S. 142, 148, 52 L. Ed. 143, 146, where a statute of Ohio was upheld which restricted the right to maintain actions in the courts of the state on account of deaths caused negligently in other states, the court, speaking by Mr. Justice Moody, said:

> "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government."

While it was claimed by the strike order that the matter had been submitted to arbitration, there was no evidence of such arbitration or award offered at the trial of the defendant. On the other hand, the Fuel Company contended that no arbitration had been had. It was clearly an attempt by coercion to compel the Fuel Company to accept an outsider's determination of a disputed question of fact and to prevent resort to courts to determine the question.

We submit that it is not unconstitutional to make a crime the inducing of the breaking of the contracts of employment by em-

ployees of the Fuel Company where there was no dispute as to wages between the Fuel Company and the employees. As was said by Mr. Justice Pitney in *Hitchman Coal & Coke Co. v. Mitchell*, supra, the right of the employees to strike does not confer upon a third person the right to instigate a strike. The right of the employees to strike did not confer upon Dorchy, an outsider, the right to instigate a strike. Dorchy was convicted of instigating a strike where there was no dispute between the employees and the company. Even if there had been an arbitration and an award, the Fuel Company could not be prevented from questioning in the courts the existence of such arbitration and award and its fairness and freedom from fraud. (Secs. 418, 429, G. S. Kan., 1915.) Yet the defendant in this case seeks to have declared unconstitutional a statute which, as applied to him, made it a crime for him by coercion and intimidation to prevent the exercise by the Fuel Company of its constitutional right to resort to courts for the interpretation and adjudication of the rights of the respective parties under a simple contract of employment.

Courts never make a contract for parties. The parties must make it for themselves. After it is made, either party has a right to submit it to the courts for interpretation. In this case there was no dispute as to the making of the contract between Mackie Fuel Company and Mishmash. The dispute was as to the facts to which the contract related. The contract was clear that Mishmash was to get $5 per day after he became nineteen. The question was, When did he become nineteen? This was a justiciable controversy which could be submitted to a court by either party. The strike was not for the purpose of fixing the rate which Mishmash was to receive after he became nineteen. It was for the purpose of compelling the Mackie Fuel Company to accept the union's finding instead of a court's finding as to the date when Mishmash became nineteen. A

strike may be lawful when used by employees to secure more favorable terms in the making of a future contract, but it is unlawful when used to compel the acceptance of the union's finding on disputed facts. No court has ever upheld the acts of a party who has compelled another party to a contract, by intimidation, to forego resort to the courts for the determination of a disputed fact under an existing contract. We submit that a statute is not void which makes it a crime to deny through intimidation another's constitutional right to resort to the courts under the circumstances here involved.

To permit Dorchy to suspend the operation of the Mackie Fuel Company mine was to give to Mishmash a special and unlawful weapon in order to collect his disputed claim. The state had provided courts in which disputed claims could be adjudicated according to law. The cause for calling the strike is clearly set forth in the strike order. (Rec. 36.) The men employed at the mines of the Mackie Fuel Company were directed and notified to cease work on February 4, 1921, until such time as the company would pay the claim of Mishmash. This claim had not been adjudicated in the court, and there was a dispute between Mishmash and the company as to its validity. Under these circumstances the resort to a strike instead of giving the Mackie Fuel Company its day in court is clearly a resort to force instead of to judicial procedure. Dorchy used the influence he had to close the mine until the claim was paid. It was a deliberate step of intimidation of the Mackie Fuel Company to pay an unadjudicated claim. For the state to have permitted this course to be pursued without inflicting punishment on Dorchy would not have afforded due process to the Mackie Fuel Company, but would have compelled it to pay the claim of Mishmash without an adjudication in court.

The Mackie Fuel Company had a right to its day in court to

contest the legality of this claim. Could not the state deter Dorchy from inducing this strike when he was not an employee of the company and had no controversy with it, by making it a crime? Would it not be denying to the Mackie Fuel Company the equal protection of the laws under the Fourteenth Amendment to permit Dorchy to intimidate the company and compel it to pay this unadjudicated claim?

In the case of *Truax v. Corrigan*, 257 U. S. 312, 42 S. Ct. 124, 129, the following pertinent language is used by Chief Justice Taft:

> "This brings us to consider the effect in this case of that provision of the Fourteenth Amendment which forbids any state to deny to any person the equal protection of the laws. The clause is associated in the amendment with the due-process clause and it is customary to consider them together. It may be that they overlap, that a violation of one may involve at times the violation of the other, but the spheres of the protection they offer are not coterminous. The due-process clause brought down from Magna Charta was found in the early state constitutions and later in the Fifth Amendment to the federal constitution as a limitation upon the executive, legislative and judicial powers of the federal government, while the equality clause does not appear in the Fifth Amendment, and so does not apply to congressional legislation. The due-process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. (*Hurtado v. California*, 110 U. S. 516, 535, 4 S. Ct. 111, 28 L. Ed. 232.) It, of course, tends to secure equality of law in the sense that it makes a required minimum of protection for everyone's right of life, liberty and property, which the congress or the legislature may not withhold. Our whole system of law is predicated on the general fundamental principle of equality of application of the law. 'All men are equal before the law,' 'This is a government of laws and not of men,' 'No man is above the law,' are all maxims showing the spirit in

which legislatures, executives and courts are expected to make, execute and apply laws. But the framers and adopters of this amendment were not content to depend on a mere minimum secured by the due-process clause, or upon the spirit of equality which might not be insisted on by local public opinion. They therefore embodied that spirit in a specific guaranty."

In *Pickett v. Walsh*, 192 Mass. 78 N. E. 753, 6 L. R. A., n. s., 1067, the defendants called a strike of the union bricklayers and stonemasons working on two of the three buildings being constructed by L. P. Soule & Son Company, general contractors, because such contractors were employing on a third building, the Ford, pointers who were not members of the bricklayers' or stonemasons' union. The pointers sought an injunction against the unions and their walking delegates.

After a discussion of the different phases of strikes, and noting that it is illegal for unions to impose a fine on the employer for employing other than union men, or for unions to forbid contractors employing nonunion men, the court said, in regard to the strike against L. P. Soule & Son Company:

> "Such a strike is, in effect, compelling the L. P. Soule & Son Company to join in a boycott on the owner of the Ford Building. It is a combination of the union to obtain a decision in their favor by forcing third persons who have no interest in the dispute to force the employer to decide the dispute in their (the defendant unions') favor. Such a strike is not a justifiable interference with the right of the plaintiffs to pursue their calling as they think best. In our opinion organized labor's right of coercion and compulsion is limited to strikes on persons with whom the organization has a trade dispute; or, to put it in another way, we are of opinion that a strike on A, with whom the striker has no trade dispute, to compel A to force B to yield to the striker's demands, is an unjustifiable interference with the right of A to pursue his calling as he thinks best."

This conclusion the court supported by a long line of state and federal decisions.

One of the decisions in the case cited above was *Toledo & A. A. R. Co. v. Pennsylvania Co.*, 54 Fed. 730. There an injunction was sought by the railroad company against Arthur, chief executive of the B. of L. E. and others, to restrain him from issuing and continuing in force an order of said brotherhood which should require the employees of the Pennsylvania Company to refuse to deliver cars to or receive cars from complainant's road. The former employees of the defendant road (members of the Brotherhood) had struck over a dispute in regard to wages. Under the rules of the B. of L. E., if there was a strike on any road, its members should not handle any cars to or from such road. It was there held that such a boycott was illegal and a combination or conspiracy for such purpose was one to commit a misdemeanor described by section 10 of the Interstate Commerce Act. If any person engaged in such a conspiracy did an act in furtherance thereof, all in such conspiracy were guilty of a criminal conspiracy as denounced by section 5440, Revised Statutes. An injunction was granted against Arthur and others. Subsequently certain of the defendants were punished for contempt in violating the injunction. (*Ibid.*, 54 Fed. 746.)

The case of *Thomas v. C. N. O. & T. P. Ry. Co.*, 62 Fed. 803, involved a petition by the receiver of that railroad against Phelan and Debs and others to prevent them from impeding the operation of the railroad in his charge by a strike of his employees and of the employees of other railroads in the city of Cincinnati, who were preventing him from receiving and delivering freight and carrying the same on the road in his charge. Such interference was not by reason of any dispute between the receiver and his employees, but by reason of a dispute between the Pullman Company and its employees. The defendants were attempting to compel the receiver and others having contract with the Pullman Company to discon-

tinue the use of the Pullman cars in violation of their contracts until the Pullman Company acceded to the demands of its employees.

In discussing legal and illegal strikes, the court said:

> "Now, what was the combination and its legal character? Was it an unlawful conspiracy? I do not mean by this an indictable conspiracy, because that depends on the statute; but was it a conspiracy at common law? If it was, then injury inflicted would be without legal justification, and malicious."
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> . . . . . .
>
> "But the combination was unlawful without respect to the contract feature. It was a boycott. The employees of the railway companies had no grievance against their employers. Handling and hauling Pullman cars did not render their services any more burdensome. They had no complaint against the use of Pullman cars, as cars. They came into no natural relation with Pullman in handling the cars. He paid them no wages. He did not regulate their hours, or in any way determine their services. Simply to injure him in his business, they were incited and encouraged to compel the railway companies to withdraw custom from him by threats of quitting their service, and actually quitting their service. This inflicted an injury on the companies that was very great, and it was unlawful, because it was without lawful excuse. All the employees had the right to quit their employment, but they had no right to combine to quit in order thereby to compel their employer to withdraw from a mutually profitable relation with a third person for the purpose of injuring that third person, when the relation thus sought to be broken had no effect whatever on the character or reward of their service." . . .
>
> "The purpose, shortly stated, was to starve the railroad companies and the public into compelling Pullman to do something which they had no lawful right to compel them to do. Certainly the starvation of a nation cannot be a lawful purpose of a combination, and it is utterly immaterial whether the purpose is effected by means usually lawful or otherwise."

In *United Shoe Machinery Corporation v. Fitzgerald et al.*, 237 Mass. 537, 20 A. L. R. 1508, it was held that a strike to compel an employer to adopt a system of collective bargaining was unlawful.

As to what constitutes legal justification for strike of employees, see Note in 24 Ann. Cas. 1302, 1916C, L. R. A., p. 989. See, also, Note, 16 A. L. R., p. 243, 6 A. L. R., pp. 917-919.

On the question of illegality of strikes, see, also, 20 A. L. R. 1513, and 26 A. L. R. 159.

Turning to the decisions of this court in *Loewe v. Lawlor*, 208 U. S. 274, 28 Sup. Ct. 301, it was held that a combination by members of labor union which had for its purpose the destruction of the business of the complainants unless the complainants unionize their shops, was illegal and violated the Sherman Antitrust Act, interstate commerce being involved. In other words, the use of strike and boycott to compel others to desist from handling the complainants' products until the complainants granted recognition of the unions was illegal.

In *Hitchman Coal & Coke Company v. Mitchell*, 245 U. S. 229, 38 Sup. Ct. 65, 62 L. Ed. 260, an action was brought by a coal company of West Virginia against the officers of an international labor union and others to enjoin them from carrying out a scheme to bring the employees of the company and all the West Virginia mining companies into the international union, so that the union could control, through its members, the production and sale of coal in West Virginia in competition with the mines of Ohio and other states. The company had required, under its various contracts of employment with its nonunion employees, that they should not remain in the complainant's employ if they joined the union. The plan of the international union was to seek to induce such employees to become members of the union, contrary to the contract of employment, to have such employees remain in the company's employ, and after enough of the employees had secretly become members of the union, instantly to declare a strike against complainant, leaving it in a

helpless situation so that it would have to consent to be unionized. This Court held that the purpose was unlawful, that the means were not lawful, and that the defendants there were engaged in an unlawful conspiracy which was enjoined. In the course of the opinion it was said:

> "Plaintiff, having in the exercise of its undoubted rights established a working agreement between it and its employees, with the free assent of the latter, is entitled to be protected in the enjoyment of the resulting status, as in any other legal right. That the employment was 'at will,' and terminable by either party at any time, is of no consequence.
>
> "The right of action for persuading an employee to leave his employer is universally recognized—nowhere more clearly than in West Virginia—and it rests upon fundamental principles of general application, not upon the English statute of laborers."
>
> . . . . . .
>
> "The case involves no question of the rights of employees. Defendants have no agency for plaintiff's employees, nor do they assert any disagreement or grievance in their behalf. In fact, there is none; but, if there were, defendants could not, without agency, set up any rights that employees might have. The right of the latter to strike would not give to defendants the right to instigate a strike. The difference is fundamental."

The government may enjoin strikes when dangerous to the public welfare and a disturbance of the public peace.

*In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900.

*United States v. Railway Employees Dept., A. F. L.*, 283 Fed. 479, 286 Fed. 228 (Shop crafts' strike, 1922).

And an injunction may be maintained although the act is subject to a criminal prosecution.

*In re Debs*, supra.

*State v. Howat*, 109 Kan. 376, 198 Pac. 686; 25 A. L. R. 1210.

*Howet v. Kansas*, 258 U. S. 181; 42 Sup. Ct. 277.

## XVIII.

**Howat and Dorchy Did Not Exercise Any Liberty, But Committed an Act of Oppression Against the George K. Mackie Fuel Company.**

In the case of *Thomas v. Cincinnati, N. O. & T. P. Ry. Co.*, 62 Fed. 803, 822, the Court, by Circuit Judge Taft, said:

> "Something has been said about the right of assembly and free speech secured by the Constitution in Ohio. It would be strange, indeed, if that right could be used to sustain the carrying out of such an unlawful and criminal conspiracy as we have seen this to be. It never has been supposed to protect one from prosecution or suits for slander, or for any of the many malicious and tortious injuries which the agency of the tongue has been so often employed to inflict. If the obstruction to the operation of the road by the receiver was unlawful and malicious, it is not less a contempt because the instrument which he used to effect it was his tongue, rather than his hand."

Howat and Dorchy were not employees of the George K. Mackie Fuel Company. Carl Mishmash had not been its employee for a year and a half. The claim of Mishmash was for the difference between $3.65 and $5 per day for the period from September 1, 1917, to March 30, 1918. The strike was called February 3, 1921, nearly three years after the termination of the period in dispute. It was not called to fix future conditions as to wages, but to recover money claimed to be due under a contract. Howat and Dorchy called the strike in the capacity as president and vice president, respectively, of District No. 14. The members of that district were coal miners, several thousand in number, employed in Crawford and Cherokee counties, Kansas, and the surrounding regions, including a section across the line in Missouri.

The George K. Mackie Fuel Company had resisted the claim because they believed Mishmash attained the age of nineteen upon August 31, 1918, at which age the higher rate of pay of $5 per day instead of $3.65 a day would have taken effect. Its contention was

supported by one of the entries in the Mishmash family Bible, which showed that Carl Mishmash was born August 31, 1899, although another entry in the Bible showed he was born August 31, 1898.

The employees at the mine were called out by the order of Howat and Dorchy "until such time as the company pays Carl Mishmash the amount of money due him," and were, in effect, ordered not to work at the mine until the claim was paid. When it was paid they were to be notified of the settlement. (Case No. 29,279, pages 36, 37.)

Howat, Dorchy and the employees did not intend that the latter should abandon their jobs. They were only to stop work until the claim was paid. (Same Record 37, 44, 45.) It was part of the scheme of compulsion that the Mackie Fuel Company should not be permitted to operate the mine with any other workmen than the strikers. When the demand was obeyed, the Fuel Company was to resume work with the strikers as employees. If the Fuel Company had attempted to operate with other employees, it could have done so only under the protection of a large force of deputy sheriffs or of National Guard, and the new workers would have encountered the hostilities of the thousands of members of District No. 14. The strike was a coercion and an intimidation upon the Fuel Company. Howat and Dorchy exercised the function of super bosses over the conduct of the industry. The operation of the industry was to cease until their order was obeyed. The financial loss suffered by the Fuel Company was to force it into submission. The Fuel Company was deprived of its legal and constitutional right to conduct its business. The action of Howat and Dorchy as the president and vice president of District No. 14 was an act of arrogant oppression.

## XIX.

### The Strike Was Illegal in Any View.

The strike was illegal for each of the following reasons, *inter alia*:

(*a*) The employees and Howat and Dorchy had no dispute of their own with the Fuel Company.

(*b*) The strike was an attempt to adjudicate the claim of Mishmash against the Fuel Company by coercion and intimidation and thus deprive the Fuel Company of its opportunity to have its day in court.

(*c*) The strike was illegal because it violated an injunction then in force issued by the District Court of Crawford county. This injunction, and the contempt proceedings under it against Howat, Dorchy and others, was the one in question in the case of *The State of Kansas v. Howat et al.*, 109 Kan. 376, wherein Howat, Dorchy, and others were found guilty of contempt of violating the injunction by calling the strike in question as well as the strike at the same time at another mine of the George K. Mackie Fuel Company, situated in Crawford county. The judgment of the Supreme Court was affirmed in this Court in the case of *Howat et al. v. The State of Kansas*, No. 491, 258 U. S. 181, 189, 190, 66 L. Ed. 550. This Court held that the injunction was issued under the general jurisdiction in equity of the District Court, that if the injunction was erroneous the error was subject to correction only by the ordinary method of appeal, and disobedience to the order constituted contempt, and that was no violation of the rights of Dorchy under the Fourteenth Amendment.

The injunction being in effect on February 1, 1921, and not appealed from by Dorchy, his action was unlawful in calling the strike.

(*d*) The strike attacked the legal and constitutional right of the George K. Mackie Fuel Company and its customers to do business.

The act of Dorchy being illegal, the Industrial Court Act making

it a crime, was not unreasonable or arbitrary as to him and no right of his under the Fourteenth Amendment was invaded.

## XX.

## Conclusion.

Entirely aside from any question whether the coal-mining business can be validly declared by the state to be affected with a public interest, we maintain that the state has the right and duty to prohibit, as it did, acts for the purpose of hindering, delaying, interfering with or suspending the operation of a coal mine.

It has always been recognized that a strike of any kind inflicts an injury upon some one else. The only question heretofore has been whether as a matter of public policy in the absence of a statute, the infliction of that injury should be permitted. This question is legislative and not judicial.

That injury was inflicted in this case is established by the fact that an injunction was issued against the commission of this very act by a court of competent jurisdiction on general equitable grounds. Dorchy and others violated the injunction, and were punished. That judgment was affirmed by the Supreme Court of Kansas and in 258 U. S. 181, and it was held no federal right of defendants had been invaded. An injunction could not have issued in such a case, unless the threatened acts were illegal, unlawful or wrongful. It has, therefore, been judicially determined that the acts which Dorchy committed in this case were wrongful. Being wrongful, it was entirely proper for the legislature to make the commission of such acts a crime.

Strikes have always been recognized as harmful and injurious, and whether the infliction of an injury to another should be permitted is ultimately for the determination of the legislature. A statute is not arbitrary or unreasonable because the legislature has reached a different conclusion as to the question of public policy

involved from that which this Court might reach. If the act prohibited could be harmful, then the action of the legislature was not unreasonable or arbitrary.

The conditions upon which was based the rule permitting certain strikes had ceased to exist in the coal-mining industry in Kansas. There was no lack of bargaining power of the miners. Their demands as to wages, hours and working conditions were usually obeyed by the coal-mine operators. The extra cost thus incurred was passed to the consumer. Owing to the domination by District 14 of this industry, the quality of the coal mined had deteriorated. The miners did not exercise proper care to avoid breaking the coal into powder.

The statute did not forbid any individual from quitting work. It did not forbid any collection of individuals from quitting work. It did not forbid any collection of individuals to quit work in concert, provided that concert was not for the purpose of hindering, delaying, interfering with and suspending the operation of a coal mine.

The liberty to quit work was not interfered with. What was prohibited was the conspiring of persons, employees or otherwise, to quit their employment, or the inducing of employees to quit their employment, for the purpose of hindering, delaying, interfering with or suspending the operation of the industry. It was this purpose to obstruct or stop the operation of the industry which was made the essential element of the offense, and not the quitting of work, not the agreement to quit work, and not the quitting of work in pursuance to an agreement.

The protection of the people of the state against damages and suffering from the interruption or cessation of the supply of coal was the object to be attained. The prohibition was against an act with a wrongful intent to do something which would necessarily inflict such an injury upon the people of the state. Most of the co-

ercive power from obstructing or stopping operation of a coal mine lay in the fact that the customers who bought the coal would be injured, and to exercise this coercion over third parties would be within the plan of every person who intentionally, in the manner stated, endeavored to obstruct or suspend the operation of the coal mine. Whoever did such an act would be a deliberate and willful inflicter of damage upon others, and oftentimes widespread damage, which might include sickness and death from lack of fuel. There could be no "justification" in morals, in economic or public policy, or any constitutional provision for an act committed under these circumstances. It is an essential function of the state to protect its people against such evils, and the decisions of this Court plainly show that the Thirteenth and Fourteenth Amendments have not impaired the exercise of such a function by the state. It was never intended by any constitutional provision to grant to any person such a power of evil-doing. It would not be the equal protection of the law to permit an officer of a labor union to inflict this damage, although other persons outside the fold of the union or the body of the strikers should not be permitted to do so by other means than strikes. It would not be the equal protection of the laws to permit such an injury to be inflicted by a strike but not to be inflicted by any other method. It is against the property right of the mining employer, under the due-process-of-law provision of the Fourteenth Amendment, to tolerate such an injury. It is against the liberty of employees other than the strikers to permit such action. The liberty of a working miner to quit work can be enjoyed without a violation of the statute. The liberty of a working miner to make contracts can be enjoyed without a violation of the statute. The liberty of the employer to make and perform contracts cannot be enjoyed if the statute is violated. A short-sighted benefit to the strikers cannot permit the infliction of such a wrong any more than an immediate benefit which

might be attained by any person in any other relation of life by causing the obstruction or stoppage of business of another, could be allowed to permit such an action. No men or class of men in this country can be licensed to impair or destroy constitutional rights. The word "liberty" and its implications are repugnant to and irreconcilable with the theory of a privilege to inflict injury upon others for profit to the injuring party.

Respectfully submitted,

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